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Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338

Dear Ms. Dortch:

SBC Communications Inc. ("SBC") submits this *ex parte* letter to highlight the need for Commission action to ensure that the decisions it makes in this proceeding are promptly implemented and not thwarted by parties with an obvious interest in perpetuating the Commission's prior, vacated unbundling rules.

The *Triennial Review Order* took effect more than 13 months ago. In the wake of that order, however, CLECs and numerous state commissions have repeatedly seized on any conceivable ambiguity or argument to stall implementation and thereby to prevent the Commission's rules from taking effect. As a result, today, notwithstanding this Commission's express direction that parties should promptly negotiate conforming agreement language to implement those rules – and its statement that failure to do so would constitute bad faith – *the vast majority of CLECs have yet to agree to amend (nor has any state commission required them to amend) their interconnection agreements to implement that order in a single SBC state.* That is true even as to unbundling determinations that either were never challenged in the D.C. Circuit or were challenged and upheld. The upshot is that the SBC ILECs are still providing these network elements at below-cost rates, even though the Commission definitively found, more than a year ago, that such elements do not satisfy the impairment test and that, as a result, unbundling of those elements was contrary to law and sound public policy.

This Commission should take resolute action here to ensure that the rules it promulgates in this proceeding do not meet a similar fate. To accomplish this, the Commission must, first and foremost, expressly preempt any state commission action purporting to countermand a Commission decision to limit or eliminate a prior unbundling requirement. Equally important, the Commission must foreclose the CLECs' from abusing the interconnection agreement change-in-law process to frustrate this Commission's rules. To this end, the Commission must either (i) make clear, as it has repeatedly done in the past, that carriers are required to comply with the Commission's new rules by a date certain and must secure any necessary agreement amendments to accomplish that result; or (ii) provide a model interconnection agreement amendment and establish a specific deadline, discussed in more detail below, at which point such an amendment will become effective in the absence of voluntary agreement. Absent action such as this, the CLECs will undoubtedly continue their concerted effort to prevent the Commission's rules from taking effect, in direct conflict with the Commission's binding determinations regarding the proper scope of unbundling under the 1996 Act.

I. The Commission Has Properly Insisted on the Importance of Promptly Updating Interconnection Agreements to Conform to Federal Law

The Commission has on two separate occasions admonished CLECs and state commissions promptly to revise interconnection agreements to conform to limitations on unbundling. First, in the *Triennial Review Order*,¹ the Commission stressed that “delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry.” 18 FCC Rcd at 17405, ¶ 703. Invoking the obligation to negotiate in good faith, the Commission stated that “parties may not refuse to negotiate any subset of the rules we adopt herein.” *Id.* at 17406, ¶ 706. In addition, the Commission instructed that “state commission[s] should be able to resolve” any disputes over contract language arising from the order “*at least* within the nine-month timeframe envisioned for new contract arbitrations under section 252.” *Id.* at 17406, ¶ 704 (emphasis added). Finally, the Commission stated that its new rules should take effect immediately, even where parties' agreements contained language stating that new rules would not take effect until there has been a “final and unappealable” change in the law. Such a change, the Commission observed, had *already* occurred, when its prior unbundling rules had been vacated. Thus, “[g]iven that the prior UNE rules have been vacated and replaced today by new rules, we believe that it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order.” *Id.* at 17406, ¶ 705 (emphasis added).

¹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*”) (subsequent history omitted).

Second, in the *Interim Order*² that the Commission released in the wake of the *USTA II* mandate, the Commission expressly authorized ILECs to initiate change-of-law proceedings before state commissions, specifically for the purpose of “allow[ing] a speedy transition in the event [the Commission] ultimately decline[s] to unbundle switching, enterprise market loops, or dedicated transport.” *Interim Order* ¶ 22. Such proceedings, the Commission explained, should “presum[e] an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements.” *Id.* “Thus,” the Commission continued, “whatever alterations are approved or deemed approved by the relevant state commission *may take effect quickly* if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order.” *Id.* ¶ 23 (emphasis added).

The message from these pronouncements is clear. It is “unreasonable and contrary to public policy to preserve” the Commission’s pre-existing rules, even “for months,” following the adoption of final rules, *Triennial Review Order*, 18 FCC Rcd at 17406, ¶ 705, and state commissions should accordingly act now to ensure a “speedy transition” upon the adoption of final rules in this proceeding, *Interim Order* ¶ 22. This message makes perfect sense. A change of law provision reflects the parties’ intent and recognition that their agreement should reflect the underlying law. When parties unnecessarily delay the execution of conforming contract amendments, they are thus not only thwarting the law and Commission policy, but also violating the spirit and intent of their own interconnection agreements.³

II. The CLECs and State Commissions Have Resisted Limitations On Unbundling Ordered by this Commission and the Courts

In accordance with this Commission’s directives, SBC and other ILECs have attempted to conform their interconnection agreements to governing federal law. SBC began this initiative on October 30, 2003, when it sent out a letter notifying all CLECs in SBC’s ILEC operating areas of their duty to amend their interconnection agreements in the wake of *USTA I* and the *Triennial Review Order*. SBC sent another letter on March 12, 2004, reminding all CLECs of the same duty, as well as of their duty to amend in light of *USTA II*. SBC sent yet a third letter upon issuance of the *USTA II* mandate, again reminding all CLECs of the duty to conform their agreements to existing law.

² Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 04-179 (Aug. 20, 2004) (“*Interim Order*”) (subsequent history omitted).

³ While decisions eliminating unbundling obligations are straightforward and easy to implement, decisions imposing new or changed obligations may require negotiation over new or modified terms and conditions. In addition, new unbundling obligations would presumably require the development of new recurring and/or non-recurring rates. The concerns expressed in this letter are therefore directed at the unnecessary and uncalled-for delay in implementing federal law in instances, such as where unbundling obligations have been limited or eliminated altogether, that should not require extensive negotiation or proceedings to develop new rates.

Despite SBC's many attempts to engage CLECs in the amendment process, the vast majority of CLECs have refused to implement changes to their agreements to reflect the decisions narrowing federal unbundling requirements, including even the portions of the *Triennial Review Order* that were not challenged in the D.C. Circuit or were upheld by that court. In addition, many of these CLECs are resisting efforts to update UNE terms (to reflect accurately the decisions set forth in the *Triennial Review Order* that no longer require the unbundling of certain UNEs) in *new* agreements that they are negotiating and arbitrating with SBC. Although SBC believes that these efforts are unlawful, these CLECs seeking to achieve by delay what they could not achieve either before this Commission or in court: the perpetuation of unbundling requirements that, as the Commission itself has expressly found, are contrary to the 1996 Act and sound policy.

The CLECs' efforts to resist implementation of current unbundling rules have in many cases been abetted by state commissions. Indeed, just yesterday, NARUC announced that it had adopted a resolution specifying that state commissions "should . . . have authority to require unbundling in addition to that required by the FCC's [rules]."⁴ That is no surprise, as some state commissions have already insisted they enjoy just such a role. In California, for example, a majority of the PUC has determined that, irrespective of this Commission's view on the matter, the PUC has independent state law authority not only to order unbundling of elements that this Commission itself has said should *not* be unbundled, but also to do so irrespective of the "necessary" and "impair" standards set out in the 1996 Act.⁵ In addition, in September of this year – after the *Interim Order* was released – the California Public Utilities Commission issued a decision setting new UNE rates, including rates for high-capacity loops.⁶ Although the *Interim Order* by its terms expressly forbids state commissions from reducing UNE rates for elements affected by *USTA II*, the California PUC ordered such reductions anyway, slashing SBC's DS1 loop rates by approximately 40%. In doing so, the California PUC acknowledged the Commission's decision in the *Interim Order* to foreclose such reductions, but it gave that decision the back of its hand, asserting that it was "inconceivable" that the Commission's order actually meant what it said.⁷

The Illinois Commerce Commission has similarly failed to implement this Commission's current unbundling rules. As this Commission is aware, the *Interim Order* proposed a second

⁴ Press Release, *NARUC Clears Twenty One Resolutions in Final Business Session* (Nov. 17, 2004).

⁵ See *Interim Opinion Establishing a Permanent Rate for the High-Frequency Portion of the Loop*, D.03-01-077, R.93-04-003 (Permanent Line Sharing Phase), at 15-16 (CPUC Jan. 30, 2003) (Attach. B hereto). Although the California PUC stayed this decision in the wake of the *Triennial Review Order*, it lifted that stay in April of this year. See *Opinion Granting Motion to Vacate Stay in Decision 04-03-044*, I.93-04-002 (Cal. PUC Apr. 22, 2004).

⁶ See *Opinion Establishing Revised Unbundled Network Element Rates for Pacific Bell Telephone Company d/b/a SBC California*, D.04-09-063, A.01-02-024 (CPUC Sept. 23, 2004) (Attach. A hereto).

⁷ See *id.* at 256.

six-month transition period, to take effect on issuance of final rules, while at the same time *mandating* that ILECs could initiate proceedings to ensure that final rules take effect as quickly as possible. In Illinois, however, the state commission got it exactly backwards. The ICC ruled that the second six-month transition period is *mandatory* (and must be incorporated into interconnection agreements today), unless the FCC issues rules *reinstating* the unbundling rules vacated in *USTA II* (in which case those reinstated rules take effect).⁸ But, if the FCC decides not to require unbundling of any *USTA II*-affected network elements, that would be a distinct change-of-law event that will not be dealt with unless and until it occurs.⁹ The ICC has thus managed to interpret the *Interim Order* – which put in place interim rules to last for at most six months, while instructing state commissions to prepare to rapidly implement final rules limiting unbundling – to require, at a minimum, six months *more* of continued unbundling, while utterly ignoring the Commission’s instruction to prepare to implement final rules. As it did so, moreover, the ICC, echoing the California PUC, highlighted its intent to rely on its purported authority under state law to mandate continued unbundling of any elements this Commission decides *not* to unbundle.¹⁰

A similar pattern appears in Texas, where SBC-Texas continues to operate under its so-called “Texas 271 agreement,” or “T2A,” even though that agreement expired by its terms over a year ago. SBC-Texas had agreed to continue to abide by that agreement until February 17, 2005, while the Texas PUC arbitrates successor agreements in numerous phases of a consolidated proceeding. However, on September 9 of this year – almost a year after the effective date of the *Triennial Review Order* and several weeks after release of the *Interim Order* – the Texas PUC, over SBC-Texas’ vigorous objection, granted a joint CLEC motion to sever all UNE issues and abate them “pending the issuance of permanent rules by the FCC.”¹¹ It did so, moreover, in *reliance* on the *Interim Order*, which the PUC read to hold that addressing UNE issues now, in advance of the Commission’s issuance of final rules, would be “wasteful.”¹² The upshot is that, far from implementing the many portions of the *Triennial Review Order* that survived judicial review, much less “presum[ing] an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to” switching and high-capacity loops and transport as the Commission instructed in the *Interim Order*, the Texas PUC has relied on that

⁸ See Amendatory Arbitration Decision at 95, *XO Illinois, Inc., Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*, Docket No. 04-0371 (ICC Oct. 28, 2004) (“*Illinois XO Decision*”) (Attach. C hereto).

⁹ See *id.* at 95-97.

¹⁰ See *id.* at 48-49 (“We conclude that our unbundling decisions, as well as the [state statutory] authority on which they are premised, presently determine the state-based unbundling obligations of SBC. . . . Therefore, ICA provisions that reflect these obligations and rights . . . should be included in the SBC-XO amended ICA.”).

¹¹ See Order Abating Track 2, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement* (TPUC Sept. 9, 2004) (Attach. D hereto).

¹² See *id.* at 2 (internal quotation marks omitted).

order to abate further review, and thereby required SBC-Texas to continue to provide maximum unbundling.¹³

Nor is SBC alone in facing state commissions intent on preserving maximum unbundling and disregarding the Commission's instructions to the contrary. Following the *Triennial Review Order*, Verizon initiated proceedings in numerous states in order to implement the rules adopted in that order. But notwithstanding the Commission's express instruction to both the CLECs and the states to revise agreements promptly rather than awaiting "any reconsideration or appeal of [the *Triennial Review Order*]," 18 FCC Rcd at 17406, ¶ 705, the state commissions simply refused to do so. Thus, for example, the North Carolina Utilities Commission abated Verizon's proceeding, on the ground that "it makes no sense" to proceed "where the underlying rules may be changed" as a result of pending appeals.¹⁴ The New Hampshire Public Utilities Commission also refused to entertain Verizon's petition, purportedly because the pending appeals rendered

¹³ This is not the only example related to Texas. In October of 2002, the Texas PUC ordered, among other things, the unbundling of (1) local switching (without exception); (2) multiplexing on a stand-alone basis; (3) digital cross-connect systems (DCS) on a stand-alone basis; and (4) Operator Services/Directory Assistance services notwithstanding SBC-Texas' offering of a customized routing solution. In each case, the Texas PUC ordered unbundling in the absence of an FCC rule requiring that unbundling, or required the unbundling without the limitations set out in federal law. For example, the Texas PUC made clear that it would not follow the FCC's rule (at least in the case of switching) even if SBC-Texas satisfied the FCC's 4-line carve out exception. The Texas PUC took issue with the evidence relied upon by the FCC, and expressly rejected the FCC's determination regarding unbundled local switching, and concluded that it had authority under state law to "adopt an order relating to the issue of unbundling of local exchange company services in addition to the unbundling" required by federal law. Arbitration Award at 69-75, 87, *Petition of MCIMetro Access Transmission Services, LLC, et al., for Arbitration with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, Docket No. 24542 (TPUC Oct. 3, 2002) (Attach. E hereto).

Other states, in addition to those described in the text, have also disregarded the Commission's limitations on unbundling. See, e.g., Order, *Petition of Level 3 Communications, LLC for Arbitration of an Amendment to an Interconnection Agreement with Ohio Bell Telephone, Company d/b/a/ SBC Ohio*, Case No. 04-940-TP-ARB (Ohio PUC Nov. 15, 2004) (ordering that the "proceeding should be stayed until three months after the FCC Order addressing the UNE rules is released") (Attach. F hereto); Final Decision, *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding The Southern New England Telephone Company's Unbundled Network Elements*, Docket No. 03-01-02 (DPUC Dec. 17, 2003) (improperly relying on *Triennial Review Order* to mandate unbundling of abandoned coaxial plant, even though it is neither a "loop" nor part of SBC's network) (Attach. G hereto).

¹⁴ *Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Docket No. P-19, Sub 477, Order Continuing Proceeding Indefinitely, at 2 (NCUC Mar. 3, 2004) (Attach. H hereto).

“the status of the applicable law . . . in flux.”¹⁵ The Public Utilities Commission of Nevada dismissed Verizon’s petition, holding that the law that Verizon sought to implement was “unsettled” and that it would therefore “be a waste of the Commission’s resources to undertake the process of amending interconnection agreements at this time.”¹⁶ And the Hawaii Public Utilities Commission dismissed Verizon’s petition because, in light of the various appeals of the *Triennial Review Order*, “the implications of the TRO are not settled” and the “legal environment . . . too uncertain.”¹⁷ These cases, moreover, are the norm. Indeed, the CLECs have crowed about their success in preventing implementation even of the aspects of the *Triennial Review Order* that were *upheld* by the D.C. Circuit, explaining that Verizon’s efforts to secure such relief “have now been ongoing for nearly eight months – *and have accomplished nothing.*”¹⁸

III. The Commission Must Confirm that CLECs Cannot Abuse the Change-of-Law Process to Prevent Implementation of Federal Unbundling Rules

Absent Commission action in this proceeding, this pattern of recalcitrance and delay is almost certain to repeat itself following the issuance of final rules. If experience is any guide, at least some parties will appeal the Commission’s rules, giving state commissions the same excuse they have used to put off implementation of the *Triennial Review Order*. In addition, capitalizing on the apparent willingness of state commissions to ignore this Commission’s unbundling rules, the CLECs are certain to advocate maximum unbundling regardless of what this Commission says. Indeed, the CLECs have already revealed their game plan in this respect. At the same time as they fight hammer-and-tong for maximum unbundling rules before this Commission – and make overheated claims that such rules are essential to their very survival – the CLECs tell the state commissions that this Commission’s section 251 unbundling decisions are absolutely meaningless. No FCC limitations on unbundling can *ever* be implemented in *any* state, they contend, because (1) “the [state commission must] undertake an independent analysis

¹⁵ *Verizon New Hampshire Petition for Consolidated Arbitration for an Amendment to the Interconnection Agreements with Competitive Local Exchange Carriers and commercial Mobile Radio Service Providers*, DT 04-018, Order No. 24,308 Addressing Motions to Dismiss at 9 (NH PUC Apr. 12, 2004) (Attach. I hereto).

¹⁶ *Petition of Verizon California, Inc. d/b/a Verizon Nevada, for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, Docket No. 04-0230, Order Granting Motions to Dismiss ¶ 22 (PUCN Apr. 28, 2004) (Attach. J hereto).

¹⁷ *Petition of Verizon Hawaii, Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Hawaii Pursuant to Section 252 of the Communications Act of 1934*, Docket 04-0040; Order No. 21022, at 19-20 (Haw. PUC, June 2, 2004) (Attach. K hereto).

¹⁸ Joint CLEC Motion to Dismiss and Answer to SBC Ohio’s Complaint at 14, *SBC Ohio v. ACC Telecommunications LLC, et al.*, Case No. 04-1450-TP-CSS (PUCO filed Oct. 15, 2004) (“*Joint CLEC Ohio Response*”) (Attach. L hereto) (emphasis added).

of Section 251 above and beyond the FCC regulations;” (2) the state commission must “enforce SBC’s merger obligations,” which purportedly mandate that “SBC remains obligated to provide” all conceivable network elements on an unbundled basis; (3) “SBC also remains obligated to provide all of the existing UNEs to CLECs under [state] law;” and (4) “SBC also has an independent obligation to provide access to network elements pursuant to its ongoing obligations under Section 271,” at “appropriate rate[s]” to be established *by the state commissions*.¹⁹ The CLECs thus plan – and state commissions have shown little proclivity to prevent – endless litigation before the state commissions directed at perpetuating the very unbundling rules that this Commission has eliminated in the *Triennial Review Order* or will limit or eliminate in this proceeding. Even if the CLECs are ultimately unsuccessful in these efforts, the proceedings themselves will consume an enormous amount of time and resources.

A. The Commission Should Expressly Preempt State Commission Action Inconsistent with this Commission’s Unbundling Determinations

The Commission must put an end to this charade. Because the CLECs and the state commissions will undoubtedly maintain that the rules the Commission articulates in this proceeding involve changes in law that require extensive negotiation and arbitration under the change of law provisions of interconnection agreements, it is absolutely critical that the Commission take affirmative and decisive steps to ensure that the Commission’s decisions to limit or eliminate specific unbundling requirements are given immediate effect, particularly given the fact that ILECs have lived with unlawful unbundling requirements for more than *eight* years. This means, first and foremost, that the Commission must authoritatively preempt the states from countermanding *any* of the Commission’s decisions to limit or eliminate specific unbundling requirements, whether pursuant to state law, section 271, purported requirements contained in the SBC/Ameritech Merger Conditions, or any other supposed “authority” that the CLECs can dream up. Absent such an authoritative statement of preemption, the Commission’s rules will be left in suspended animation, as the CLECs will continue to raise, and the state commissions will continue to entertain, arguments about alternative unbundling regimes that have no basis in law but that will nonetheless provide fodder for still more delay in the implementation of the Commission’s new rules.

¹⁹ *Joint CLEC Ohio Response* at 7, 20-21. The CLECs have made the same arguments in the other states in which SBC has sought to implement the *Triennial Review Order*. See, e.g., Joint CLEC Motion to Dismiss, Motion in the Alternative for a Sufficient Pleading and for a Bill of Particulars, and Verified Answer to Illinois Bell’s Amended Complaint, *Illinois Bell Tel. Co. v. 1-800-RECONEX, Inc.*, Docket No. 04-0606 (ICC filed Nov. 1, 2004) (Attach. M hereto); CLEC Coalition Motion to Dismiss, *Application of SBC Michigan for a Consolidated Change of Law Proceeding to Conform 251/252 Interconnection Agreements to Governing Law Pursuant to Section 252 of the Communications Act of 1934, as amended*, Case No. U-14305 (Mich. PSC filed Oct. 29, 2004); AT&T’s Answer and Motion to Dismiss, *Complaint of Nevada Bell Telephone Co. d/b/a SBC Nevada Pursuant to NAC 704.68035 to 704.680365 to Resolve Dispute on Conforming Nevada Interconnection Agreements to Governing Law Under the Telecommunications Act of 1996*, Docket No. 04-9019 (Nevada PUC filed Sept. 29, 2004).

In this respect, moreover, it is not enough for the Commission simply to state, as it has already done, that a state commission decision countermanning an FCC unbundling determination is “unlikely” to survive a preemption analysis. *See Triennial Review Order*, 18 FCC Rcd at 17101, ¶ 195. The CLECs have already contended, and at least one state commission has already suggested, that this purportedly “narrow” statement is utterly meaningless, unless and until the state itself actually orders unbundling under state law, and the ILEC then obtains from this Commission an order of preemption pursuant to section 253(d).²⁰ Merely rehashing the *Triennial Review Order*’s discussion on this issue is thus an invitation to more litigation and delay. Instead, what is needed – and what is clearly warranted in light of the CLECs’ and state commissions’ demonstrated intent to delay the implementation of this Commission’s rules at all costs – is an express and unequivocal holding that state commissions may not, under *any* source of authority, countermand the unbundling determinations the Commission reaches in this proceeding, or reinstate unbundling requirements that have been eliminated by the Commission.

B. The Commission Should Establish a Date Certain for Implementation of Its New Rules, Including Adoption of Any Necessary Interconnection Agreement Amendments

Even an express statement of preemption, as critical as it is, is not enough to ensure timely implementation of the Commission’s new rules. In addition to foreclosing such substantive avenues for thwarting the Commission’s unbundling rules, the Commission must also cut off the many procedural gambits – in particular, abuse of the interconnection agreement change-of-law process – that the CLECs have used and will continue to use to attempt to delay implementation of those rules. Doing so would be quite simple. The Commission need only make clear that its decisions, including any transition period it establishes, create binding federal law and that carriers are legally obliged to take whatever steps are necessary to implement those decisions in a timely manner. If an interconnection agreement must be changed, then it is the carriers’ responsibility to effect those changes in sufficient time to comply with the new federal rules.

Clarifying the law in this manner actually breaks no new ground. The Commission routinely adopts new rules and implementation deadlines and requires carriers subject to its jurisdiction to take whatever steps are necessary to comply with those rules when they take effect. Requiring that carriers make any necessary revisions to their interconnection agreements to eliminate unbundling obligations *not* required by law is no different. Indeed, such revisions are purely ministerial in nature and require far less effort and time than do most implementation efforts. No new systems need be established, no new technology or software changes need be deployed, no investment is necessary, no training is required, and no new methods and procedures need be established. All that is required is a change in a contract, the substance of which has been specified by the Commission.

²⁰ *See, e.g.*, Covad’s Motion to Enforce D.03-01-077, I.93-04-002 (Line Sharing Phase), at 15-17 (CPUC filed Dec. 23, 2003) (excerpt included as Attach. N hereto); *ICC Amendatory Order* at 48-49.

Indeed, the Commission has routinely insisted that carriers comply with unbundling mandates by a date certain, and imposed upon the parties subject to its rules the obligation to conform their agreements accordingly. Thus, for example, when the Commission established national, default collocation intervals, it simply directed that ILECs, regardless of what their interconnection agreements provided, file tariff and SGAT amendments within 30 days (with the tariff amendments to take effect at the earliest time permissible under state law, and the SGAT amendments to take effect 60 days after filing).²¹ It then directed the parties to undertake good faith negotiations to revise their existing agreements to reflect those intervals.²² Similarly, in the *Interim Order*, the Commission ordered continued unbundling for six months or until the issuance of final rules, “under the rates, terms and conditions that applied under [existing] interconnection agreements as of June 15, 2004.” *Interim Order* ¶ 21. The Commission did so, moreover, regardless of contrary terms in existing agreements (terms that, for example, automatically excluded UNEs in the event of a judicial vacatur).²³ Likewise, as noted above, the *Interim Order* proposes a second six-month transition that would take effect upon the issuance of final rules. And, like the initial transition period, that second six-month period by its terms would take effect regardless of the language in existing interconnection agreements. *See Interim Order* ¶ 29. The Commission has thus repeatedly acted on the understanding that its unbundling rules are to be given effect by carriers subject to its jurisdiction, and it is thus incumbent upon the parties themselves to arrive at conforming language to give effect to the Commission’s rules.²⁴ Express recognition of this fact here would establish that CLECs have nothing to gain by abusing the change-of-law process, and would ensure prompt implementation of the Commission’s rules.

Nor is it the case that a mandate to carriers (including CLECs) to conform their agreements by a date certain would impermissibly tread on section 252 of the 1996 Act (and the interconnection agreement process it contemplates). For one thing, the *timing* requirements set out in section 252 – both for the parties to conclude interconnection agreement negotiations and arbitrations, as well as for state commissions to review and approve the results – are by their

²¹ *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 15 FCC Rcd 17806, ¶¶ 34-36 (2000).

²² *See id.*

²³ *See Verizon Comments* at 135-36.

²⁴ In addition to the examples described in the text, see *Local Competition Order*, 11 FCC Rcd 15499, 16016, ¶ 1042 (1996) (regardless of any agreements to the contrary, “[a]s of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.”); *id.* at 16029, ¶ 1065 (“we order incumbent LECs upon request from new entrants to provide transport and termination of traffic, on an interim basis, pending resolution of negotiation and arbitration regarding transport and termination prices, and approval by the state commissions”).

terms directed at *new* agreements. They have no bearing on ministerial revisions to existing agreements, and thus a mandate to parties to incorporate new rules by a date certain could in no way conflict with those timing requirements. What is more, nothing in section 252 requires state commission *approval* prior to giving effect to a contract amendment; on the contrary, as discussed below, at least one state expressly provides that negotiated agreements are effective *upon filing* with the state commissions. The Commission has expansive authority over the implementation of the 1996 Act. *See* 47 U.S.C. 201(b); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999). Particularly where nothing in section 252 requires a different result, this authority is enough, standing alone, to require carriers to conform to the Commission's existing rules by a date certain, and to make any changes to their agreements that are necessary to accomplish that result.

Apart from its general authority under the 1996 Act to require carriers to adhere to its rulings, moreover, the Commission has ample authority to create a transition away from agreements that were entered into under a regime that the federal courts have authoritatively determined to be unlawful. It is well established that “[a]n agency, like a court, can undo what is wrongfully done by virtue of its order.” *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965); *see Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992) (noting the “general principle of agency authority to implement judicial reversals”). The unbundling obligations that are embodied in existing interconnection agreements – and that the CLECs are now fighting so hard to sustain – are the direct result of the Commission's prior, unlawful unbundling orders. To give full and fair effect to the Supreme Court's and the D.C. Circuit's vacatur of those orders, the Commission must make clear that change-of-law (or other) provisions in an interconnection agreement cannot be used to impede the implementation of the new rules promulgated by the Commission in this proceeding. Indeed, anything less would “frustrate . . . the intended effect of [the D.C. Circuit's] decree” by leaving ILECs “in effect no better off than [they were] during the entire course of the [prior] litigation.” *MCI Telecommunications Corp. v. FCC*, 580 F.2d 590, 594, 597 (D.C. Cir.) (“*Execunet II*”), *cert. denied*, 439 U.S. 980 (1978).

C. An Alternative Framework For the Implementation of the Commission's New Rules

If the Commission does not clarify that carriers must by a date certain comply with its rules and secure any contract modifications necessary to ensure that result, the Commission at a minimum must establish a framework to facilitate prompt revision to existing interconnection agreements. As explained above, the CLECs themselves have bragged that the halting steps the Commission took in the *Triennial Review Order* permitted the ILECs to “accomplish[] nothing” in the year since that order took effect.²⁵ Far more is necessary if the Commission is to prevent the same fate here. In particular, the Commission must establish both clear rules for revising interconnection agreements to conform to its new rules (in particular, those new rules eliminating requirements to provide unbundled network elements), as well as clear and serious consequences if the CLECs fail to adhere to those rules.

²⁵ *Joint CLEC Ohio Response* at 14.

First, the Commission must provide a clear and concise list of network elements, including precise definitions, that are no longer required to be provided under section 251, along with a sample interconnection agreement amendment that the Commission finds to be accurate and lawful contract language eliminating these network elements from existing interconnection agreements in accordance with its order.²⁶ Such a list and sample interconnection agreement amendment language would prevent CLECs and state commissions from disputing that the Commission actually means what it says when it determines that a particular network element need not be unbundled, and would minimize disputes over conforming language that will give effect to the Commission's order. The approval of a sample agreement amendment, however, would not preclude ILECs and CLECs from negotiating different conforming amendment language if they chose to do so.

Second, the Commission must clearly state that the process of amending an interconnection agreement to conform with changes in unbundling requirements contained in its order and, in particular, those new rules eliminating requirements to provide unbundled network elements, should be a purely ministerial one that does not require negotiation, arbitration, dispute resolution, or protracted state review.

Third, in order to ensure that this process is a purely ministerial one, the Commission must expressly permit ILECs to offer to CLECs the Commission's sample interconnection agreement amendment itself, or an alternative amendment eliminating network elements in conformance with the Commission's order, any time after the date of release of the order. It must further find that any failure by a carrier to agree to the Commission's sample interconnection agreement amendment itself, or to a proposed amendment that is in all material respects identical to the Commission's sample interconnection agreement amendment, within 30 days of receipt of such amendment will constitute a failure to negotiate in good faith. Equally important, the Commission must further make clear that any claim regarding a failure to negotiate in good faith will be addressed expeditiously, within a set time period, and that a finding that a party has failed to negotiate in good faith will result in penalties and a true-up.

Fourth, the Commission should hold that its sample interconnection agreement amendment is effective when filed with a state commission. The Commission should further find that conforming amendment language that is in all material respects identical to the Commission's sample interconnection agreement amendment is also effective when filed but is subject to state commission review. By way of example, the Ohio PUC has a procedural rule that provides that "[a]n agreement adopted by negotiation or mediation shall become effective

²⁶ An example of such interconnection agreement amendment language could be the following: "In accordance with the Report and Order, In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313 and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 and notwithstanding any other provision of this interconnection agreement between *ILEC* and *CLEC*, *ILEC* is no longer required to provide *CLEC* with the following network elements: [list the network elements that no longer are required to be provided]."

upon filing, but will still be subject to a 90-day review and approval process.”²⁷ The Commission should establish similar procedural rules for reviewing conforming amendment language that is in all material respects identical to the Commission’s sample interconnection agreement amendment (albeit with much shorter time frames discussed below) to ensure that there is no delay in the implementation of its new rules.

Fifth, the Commission should rule that if an ILEC offers a CLEC the Commission’s sample interconnection agreement amendment itself and it is *not* signed by the CLEC within 30 days, then the ILEC may file that amendment with the state commission and it shall be deemed approved when filed. Any such filing with the state commission shall not prevent the FCC from considering independently allegations of bad faith negotiations. Further, the Commission should rule that if, within 30 days after receiving a proposed conforming amendment that is in all material respects identical to the Commission’s sample amendment, a party to an interconnection agreement does not agree to such language, the other party may file its proposed amendment with the state commission. The state commission shall have authority to order the refusing party to sign such amendment when the state commission approves it as being in conformance with the Commission’s order.²⁸

Sixth, the Commission also should make clear that, in the event a state commission does not complete review of a proposed conforming amendment within 30 days after it is filed with the state commission, either party may ask the Commission to complete such review and it will do so within 30 days. It must be emphasized here that, as discussed above, there is no basis for applying the timelines for negotiated and arbitrated agreements set forth in section 252. As noted above, the amendment of interconnection agreements to conform to the Commission’s new rules and, in particular, those new rules that limit or eliminate altogether the requirement to provide certain unbundled network elements, is a ministerial task that bears little resemblance to the negotiation of rates, terms and conditions for new interconnection and unbundling requirements contemplated by section 251. As a result, the negotiation, arbitration and approval time limits set forth in section 252 do not apply on their face, and should not be imported into this ministerial process of eliminating unbundling requirements that currently are contained in existing interconnection agreements.

The key consideration here is the presence of a firm end-date to the process. The steps described above would ensure that existing interconnection agreements will be revised to implement the Commission’s new rules, including any transition rules, within 90 days of the effective date of the order. Although SBC believes 90 days is more than ample time to ensure that existing agreements are conformed to the Commission’s new rules, the key point is that

²⁷ Ohio PUC Guidelines for Mediation and Arbitration VI.B.

²⁸ The Massachusetts DTE has approved this remedy in similar circumstances, and it has been affirmed in federal court. *See* Order on Verizon New England, Inc.’s Motion for Approval of Final Arbitration Agreement or, In the Alternative, for Clarification, *Petition of Global NAPs, Inc.*, DTE 02-45 (Feb. 19, 2003), *aff’d*, Memorandum of Decision, *Global NAPs, Inc. v. Verizon New England, Inc.*, Civ. No. 03-10437-RWZ (D. Mass. May 12, 2004).

there must be a date certain by which the process is guaranteed to come to a close. Absent such a date-certain, the CLECs will have every incentive to drag out the process indefinitely, and the state commissions, which have to date shown no inclination to prevent such delay, are unlikely to do anything to stop them.

* * *

The Communications Act provides that “it shall be the duty of the Commission . . . to forthwith give effect” to a judgment reversing an FCC order. 47 U.S.C. § 402(h). That obligation takes on considerable force in this context, where ILECs have toiled for more than eight years under rules and pursuant to interconnection agreements containing unbundling requirements that have *never* been ruled lawful. To give effect to the D.C. Circuit’s *USTA I* and *USTA II* mandates – and to ensure that the industry is governed by the national rules the Commission puts in place in this proceeding – the Commission must take authoritative steps to ensure the prompt implementation of its forthcoming rules. The simplest, most direct way to accomplish this aim is to clarify that CLECs must comply with those rules, and to put the onus on them to obtain any necessary revisions to their interconnection agreements. In the alternative, at a bare minimum, the Commission must put in place a clear framework, with a definitive end-date, for incorporating its new rules into existing interconnection agreements. Absent such action, the rules the Commission is laboring so hard to produce in this proceeding could be largely academic, and the perpetuation of unlawful unbundling requirements contained in current interconnection agreements could remain in effect for the foreseeable future.²⁹

Yours truly,



Colin S. Stretch

cc (w/ attachments):

Jeffrey Carlisle
Jeffrey Dygert

cc (w/o attachments):

Michelle Carey	Chris Libertelli	John Rogovin
Thomas Navin	Matt Brill	John Stanley
Jeremy Miller	Dan Gonzalez	Chris Killion
Russ Hanser	Scott Bergmann	Linda Kinney
	Jessica Rosenworcel	Debra Weiner

²⁹ By filing this *ex parte* letter, SBC does not waive any rights that it has to challenge (on appeal or otherwise) the results of any ruling or order by any governmental body, including the Commission’s resolution of this proceeding, or to otherwise take action to vindicate its rights under any regulatory or judicial decision.

Attachment A

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



February 4, 2003

TO: ALL PARTIES OF RECORD IN RULEMAKING 93-04-003/I93-04-002.

Decision 03-01-077 is being mailed without the Dissents of Commissioner Lynch and Commissioner Wood. The Dissents will be mailed separately.

Very truly yours,

/s/ Carol A. Brown, Interim Chief
Administrative Law Judge

CAB:vfw

Mailed 2/04/03

Decision 03-01-077 January 30, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks.

Rulemaking 93-04-003
(Filed April 7, 1993)

Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks.

Investigation 93-04-002
(Filed April 7 1993)

**(Permanent Line Sharing
Phase)**

**INTERIM OPINION ESTABLISHING A PERMANENT RATE FOR THE
HIGH-FREQUENCY PORTION OF THE LOOP**

(See Appendix A for a List of Appearances)

cable modem availability is relatively limited at this time. As a policy, we wish to encourage competition in residential DSL offerings because today there is a lack of affordable, ubiquitously available broadband service options provided by alternative cable modem, satellite and wireless technologies. Our interest is in encouraging the availability of affordable broadband services to California consumers. Until such time that comparatively affordable, competitive broadband alternatives are widely available to residential consumers, line sharing should continue to be offered as a UNE. The excerpts from our comments filed at the FCC cited above, are included, not in an attempt to meet the FCC's necessary and impair test (which we agree does not apply to the states), but to give the current status of the broadband market in California.

AT&T asserts that Pacific's claim, in its comments on the RDD, that there is no record evidence to meet the "necessary and impair" test is simply irrelevant, since this Commission is not bound by the FCC's "necessary and impair" test. We concur with AT&T's conclusion that this Commission is not bound by the necessary and impair test.

In California, § 709.7 of the P.U. Code is a clear indication of state policy that directs the CPUC to promote line sharing. In 1999 when that section was added to the P.U. Code, the technical feasibility of line sharing was in question, unlike today when CLECs are providing broadband service to one million Californians in line sharing arrangements with the ILECs. In 1999, the FCC was still evaluating line sharing, and had not yet issued a final order. The Legislature ordered the Commission to participate in the FCC's proceeding, and indicated that if the FCC did not act before January 1, 2000:

...the Public Utilities Commission shall expeditiously examine the technical, operational, economic, and policy implications of interconnection as described in subdivision (b) and, if the Public Utilities Commission determines it to be appropriate, adopt rules to require incumbent local exchange carriers in this state to permit

competitive local exchange carriers to provide high bandwidth data services over telephone lines with voice services provided by incumbent local exchange carriers. (P U Code § 709.7(c).)

Unless it is demonstrated that such policy is inconsistent with, or substantially prevents implementation of the requirements of the 1996 Act, the CPUC regulations promoting line sharing shall be enforced. In enacting § 709.7, the Legislature made it clear that CLECs should have access to line shared loops, and this Commission has an obligation to follow the legislative dictate to ensure that that HFPL is available to CLECs.

The ILECs would have us put this proceeding on hold, pending the outcome of the D.C. Circuit decision. We are not willing to do that. Parties and the Commission have invested significant time and effort in developing this record to enable us to adopt permanent prices for the HFPL, and to resolve some outstanding issues from the line sharing arbitration proceeding. Consistent with §§ 261(b) and (c) of the Act, and given the state's independent authority under Pub. Util. Code § 709.7 and that section's mandate, we have the authority to require line sharing and to set permanent rates for the line-sharing UNE. We exert that authority here and order that ILECs will continue to offer the line sharing UNE, and we adopt permanent prices for the HFPL in California.

4. The Appropriate Charge for Use of the High Frequency Portion of the Loop is \$0

A. Parties' Positions

1. Rhythms' Links, Inc.'s (Rhythms) Position

Rhythms asserts that there should be no charge for the HFPL.

According to Rhythms virtually all states except California have established a \$0 price for the HFPL, having determined that a \$0 price complies with pertinent FCC pricing rules and reflects sound economic and regulatory policy. A \$0 price is both cost-based and nondiscriminatory. Furthermore, it reflects the pricing

Attachment B

Decision 04-09-063 September 23, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Switching in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 01-02-024
(Filed February 21, 2001)

Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Loops in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 01-02-035
(Filed February 28, 2001)

Application of The Telephone Connection Local Services, LLC (U 5522 C) for the Commission to Reexamine the Recurring Costs and Prices of the DS-3 Entrance Facility Without Equipment in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-031
(Filed February 28, 2002)

Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Interoffice Transmission Facilities and Signaling Networks and Call-Related Databases in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-032
(Filed February 28, 2002)

Application of Pacific Bell Telephone Company (U 1001 C) for the Commission to Reexamine the Costs and Prices of the Expanded Interconnection Service Cross-Connect Network Element in the Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-034
(Filed February 28, 2002)

Application of XO California, Inc. (U 5553 C) for the Commission to Reexamine the Recurring Costs of DS1 and DS3 Unbundled Network Element Loops in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-03-002
(Filed March 1, 2002)

**OPINION ESTABLISHING REVISED UNBUNDLED NETWORK
ELEMENT RATES FOR PACIFIC BELL TELEPHONE COMPANY
DBA SBC CALIFORNIA**

Mpower notes that on August 20, 2004, the FCC issued an interim “standstill” order in its UNE rulemaking proceeding that directs incumbent LECs such as SBC-CA to continue providing UNEs at the rates under their interconnection agreements as of June 15, 2004, except if those rates are superseded by voluntary negotiated agreements, an intervening FCC order, or a state public utility commission order *raising* the rates for UNEs.⁹⁵ Mpower requests that before adopting any new UNE rates for voice grade and DS-1 loops, the Commission should secure assurance from the FCC that DS-1 loop rate reductions would be permitted to take effect concurrent with any basic loop increases.

We find it inconceivable that after this Commission’s exhaustive review of SBC-CA’s UNE prices to set cost-based and TELRIC compliant DS-1 rates, the FCC’s latest order could preclude the rate in this order from taking effect. This result would, in our view, violate Section 252(d) of the Telecommunications Act requiring incumbent LECs to charge cost-based rates for UNEs, and we cannot comprehend that the FCC intended this result. We will proceed to adopt the rates set forth in this order and presume that they will take effect as consistent with the requirements of Section 252(d).

MCI, Mpower and CALTEL comment that the Commission must revise the RPD to remedy the 21% shared and common cost markup added to all SBC-CA UNE costs following the recent 9th Circuit decision finding the markup is

⁹⁵ See *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-330, Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. August 20, 2004), para. 29. (emphasis added).

Attachment C

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

XO Illinois, Inc.	:	
	:	
Petition for Arbitration of an Amendment	:	
to an Interconnection Agreement with	:	04-0371
Illinois Bell Telephone Company Pursuant	:	
to Section 252(b) of the Communications	:	
Act of 1934, as Amended.	:	

AMENDATORY ARBITRATION DECISION

October 28, 2004

applicable state commission, SBC's proposed language is heavily qualified with vague limitations.

Staff recommends that the Commission reject SBC's unreasonably vague language.

Regarding the issue of whether "the issuance of USTA II means that through this proceeding SBC may no longer make certain UNEs available under section 251", the ALJ explained that:

Regarding USTA II, although XO personnel did decline negotiations concerning that decision, the inescapable fact is that USTA II modifies and nullifies portions of the TRO. The latter cannot be properly interpreted or implemented without reference to the former. Therefore, even if USTA II, qua USTA II, were excluded from negotiations, its impact on the TRO would have to be incorporated in the Commission's analysis of the issues properly presented for arbitration. Except insofar as there may be some practical distinction between consideration of USTA II in its own right and consideration of the TRO as modified by USTA II (and the ALJ can perceive none), the instant Motion cannot be granted.

ALJ Ruling, June 23, 2004, at 2.

It is the Staff's position that, at least as far as applying the proposed language at issue in this issue is concerned, the ALJ's perception that there is likely no difference between the TRO and USTA II is accurate. The stated FCC preference for negotiations, over language that would allow the BOC to over-ride section 252 negotiations, can address TRO related issues as modified by USTA II. Staff, accordingly, recommends that the Commission adopt XO's proposed language for all of the reasons articulated in detail above.

The Staff, moreover, takes the position that SBC is also obligated to provide UNEs to CLECs under the applicable state law, including the orders and rules of this Commission but also under the applicable requirements of the PUA.

2. Analysis and Conclusions

SBC-1. The Commission rejects SBC's proposal to insert the term "lawful" in the sections of the amended ICA that SBC discusses in connection with SBC-1, and in connection with any other disputed issue in this arbitration as well. Such language is unnecessary, likely to trigger future disputes between the parties, and could be readily abused to delay XO's access to SBC services. Since XO cannot hope to successfully demand access to "unlawful" UNEs, inclusion of this term serves no constructive

purpose. Indeed, if such inclusion were necessary to the identification of what is permissible under the ICA, the “lawful” modifier would have to be inserted before every material noun in the ICA.

Similarly, SBC proposes to place the “lawful” modifier before references to the orders and/or rules of the FCC, the courts and this Commission. Unless they are under stay by a superior authority, such orders and rules are inherently lawful and effective. In effect, SBC’s proposed language would empower SBC to implement the ICA by second-guessing - outside regular appellate processes - the viability of regulatory and judicial rulings.

SBC compounds its error by proposing, in SBC Section 1.1, to add the condition that “lawful” and “effective” orders and rules must also be “necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the [Federal Act] or the FCC’s regulations to implement the [Federal Act].” Thus, within the operation of the ICA, administrative and judicial decisions will be judged SBC for their consistency with SBC’s view of the Federal Act and associated FCC regulations. At the logical extreme, nothing in SBC’s proposed language would preclude SBC from holding that a conclusion in an administrative or judicial decision affronted the Federal Act, even when that decision expressly held to the contrary.

It is entirely reasonable for SBC to propose ICA language that will assure that SBC is not obligated to provide services at TELRIC prices unless those services, and the carriers requesting them, are entitled to such prices. It is entirely unreasonable to achieve the objective by empowering SBC to unilaterally adjudicate the content, validity and viability of non-stayed judicial and administrative authorities⁴². Moreover, by arrogating such power, SBC will elicit disputes with XO and delay XO’s access to competitive services. The far better course is to employ language providing that when SBC is relieved of the obligation to furnish a UNE under federal and state law, its corresponding obligation under the ICA will also be relieved (by the process discussed in relation to SBC-2, below).

The answer, then, to SBC-1 is that SBC is not obligated to continue providing UNEs under the ICA when no such obligation exists under federal or state law. However, SBC’s “unlawful” UNE scheme is ill-suited to excluding that obligation from the ICA.

SBC-1 & SBC/XO-1a. Section 271 of the Federal Act creates an unbundling obligation to which SBC must adhere, irrespective of its duties under Section 251 and the associated impairment analysis⁴³. “[T]he requirements of section 271(c)(2)(B)

⁴² SBC itself objects, in the context of SBC Issue 13, that “XO cannot unilaterally determine the effect of...change in law, including whether that change in law will be give any effect at all.” SBC Init. Br. at 89.

⁴³ SBC asserts that this Commission lacks “jurisdiction” to “require the parties to include in the contract language governing access to section 271 network elements.” SBC BOE at 6. We disagree. Our detailed discussion of this claim appears in our analysis of SBC Issue 4, below. That discussion fully

establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.” TRO, ¶ 653. However, the FCC also held that Section 271 “does not require TELRIC pricing” for elements unbundled pursuant to that statute. TRO ¶ 659. Instead, prices for Section 271 UNEs must be just, reasonable and non-discriminatory, per Sections 201 and 201 of the Federal Act. TRO ¶ 656.

The parties’ disagreement respecting 271 UNEs is reflected in so many provisions throughout their respective proposed TRO Attachments that we cannot address them individually. Nevertheless, certain principles should be adhered to throughout the parties’ ICA. Language relieving SBC of its obligation to unbundle elements under Section 271 is prohibited; correspondingly, language authorizing such unbundling (e.g., XO proposed Section 3.1.4.1) is permissible. Language requiring SBC to offer 271 UNEs, qua 271 UNEs, at TELRIC prices, is prohibited; correspondingly, language authorizing SBC to offer 271, qua 271 UNEs, at prices determined per the criteria Sections 201 and 201 of the Federal Act is permissible.

SBC contends, however, that the *Status Quo* Order precludes incorporation into the ICA of provisions pertaining to Section 271 (or state law), on the ground that such provisions would impermissibly expand the XO’s contract rights, thereby altering the status quo. SBC Supp. Br. at 5. Since the ICA is not in the record, the Commission cannot assess the factual support for this claim by comparing current ICA text with XO’s proposed language. In any event, the Status Quo Order addresses and “freezes” only an ILEC’s unbundling obligations under Section 251. The Section 271 obligations confirmed in the TRO are not addressed and, indeed, did not need to be, since (unlike Section 251 obligations) they were not vacated by USTA II. Furthermore, Section 271 unbundling rights are not an “expansion” upon Section 251 rights. They are lesser rights, involving higher prices to the CLEC and no right to demand combinations.

This state has also established unbundling requirements, characterized in Section 13-801 of the Act⁴⁴ as “additional” to federal unbundling requirements. When the pertinent ILEC is subject to an alternative regulation plan under Section 13-506.1 of the Act⁴⁵, as SBC is, such additional obligations may exceed or be more stringent than Section 251 obligations. *Id.* We have held that we lack authority to declare that Section 13-801 is preempted by federal authority, insofar as that statute authorizes unbundling in excess of federal requirements. Docket 01-0614, Order, June 11, 2002, ¶ 42.

The FCC does have the power to preempt, as subsection 13-801(a) expressly acknowledges. That power is codified in Section 253(d), and the FCC observed in the TRO that “[p]arties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may” request preemption under that section. TRO ¶ 195. SBC has apparently not done so. XO Init. Br. at 28.

applies with respect to SBC Issue 1, and to all the other open issues for which SBC makes the same assertion.

⁴⁴ 220 ILCS 5/13-801.

⁴⁵ 220 ILCS 5/13-506.1.

The FCC also explained in the TRO that:

If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment - and thus has found that unbundling that element would conflict with the limits in Section 252(d)(2) - or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and “substantially prevent” implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules.

TRO ¶195. Consequently, this Commission has reopened our Docket 01-0614 “to determine whether the Commission’s unbundling decisions in this case are in conflict with federal law, and, if so, to determine the appropriate unbundling provisions to be established consistent with Illinois and federal law.” Docket 01-0614, Order on Reopening, June 23, 2004, at 9.

Thus, this Commission is presently reconsidering its unbundling power and associated decisions under, *inter alia*, state law, while the FCC is simultaneously reconsidering its own unbundling decisions under federal law, after the remand in USTA II. Within this state of flux, we must nevertheless determine how *presently existing* state authority and regulatory decisions are to be reflected in the parties’ ICA, without speculating about (or prejudging, with respect to Docket 01-0614) future developments. We conclude that our unbundling decisions, as well as the Section 13-801 authority on which they are premised, *presently* determine the state-based unbundling obligations of SBC (and XO’s corresponding rights of access to unbundled elements). Therefore, ICA provisions that reflect these obligations and rights (e.g., XO proposed Section 1.1) should be included in the SBC-XO amended ICA.

Moreover, for purposes of the ICA, our presently effective rulings must be taken at face value. Although SBC may believe that we have required unbundling under Section 13-801 (including TELRIC-priced unbundling) that exceeds what Section 251 would allow, that belief is irrelevant at present. Similarly irrelevant is the argument that our rulings are inconsistent with Section 261(c) of the Federal Act, which would contravene Section 13-801. Our currently viable unbundling rulings were based on our judgment that they are consistent with Section 261(c). Such judgment would have to be overturned on appeal or preempted through Section 253(d), not collaterally challenged in arbitration (or worse, unilaterally by SBC, within the context of the ICA). Put simply, our unbundling mandates are effective today, and unless or until they are altered

(whether by us or by superior authority) they must be incorporated in the parties' ICA. Future unbundling developments should be accommodated through change-of-law provisions.

In view of the foregoing principles and conclusions, the Commission rejects XO's recommendation that only "final and non-appealable" non-impairment decisions will terminate an SBC unbundling obligation. The terms of a non-stayed regulatory order must be obeyed.

SBC/XO-1b. The Commission concurs with XO and Staff that SBC's proposals would essentially replace the change-of-law provisions in the parties' existing ICA with unilateral powers for SBC. XO Init. Br. at 29; Staff Init. Br. at 62. Those provisions contemplate bilateral negotiations between the signatories. In contrast, SBC's amendatory contract language (e.g., SBC proposed Section 1.1) would empower SBC to decline to provide UNEs, based upon, first, its unilateral assessment of the ramifications of regulatory and judicial authorities, and, second, its unilateral judgment of the efficacy of those authorities themselves, based on criteria we rejected above. Such provisions do not belong in the parties' ICA, whether to incorporate changes already compelled by the TRO or any future changes associated with the TRO and USTA II.

2. What is the appropriate transition and notification process for declassified UNEs?

XO re-characterizes this issue as follows:

- (a) Whether SBC may attempt to modify the "Change of Law" provisions in the Agreement, in order to implement automatically any future changes in law to the agreement.**
- (b) What are the circumstances under which SBC may no longer be required to make certain UNEs available?**
- (c) May SBC unilaterally discontinue providing a UNE after a 30-day transitional period if the parties have not mutually agreed to negotiate terms and conditions regarding such UNE?**

1. Parties' Positions and Proposals

a). SBC

In order to properly implement the *TRO*, the parties' contract must be amended to provide a clear, orderly, and definite process for the transition of network elements that are no longer UNEs. XO's proposed language does not provide for any real transition plan at all to implement the *TRO*'s declassifications, and thus does not appropriately implement the requirements of the *TRO*. (See XO Section 3.13.1.1.) In particular, XO's proposed language would allow for a transition only if the parties were

provisions appears to result in changes of law as defined becoming effective without subsequent negotiation. For this reason, the Staff favors XO's proposal.

2. Analysis and Conclusions

The Commission finds that this issue, as worded, has been mooted by the termination of the stay of vacatur in USTA II, and by the FCC's choice to issue interim rules pertaining to specified UNEs in the *Status Quo* Order. Wherever it has been pertinent, our findings and conclusions in this Decision have incorporated the fact that portions of the TRO have been reversed or vacated. Accordingly, we have given effect to those elements of the TRO that have not been vacated, and not given effect to vacated elements. Thus, nothing in SBC's proposed Section 5.b needs to be included in the amended ICA.

XO's proposed text is similarly unnecessary. Its proposed "option" would arise only after vacatur, and vacatur has already been taken into account in our analysis and rulings here. With regard to the non-waiver language in XO's prefatory text (which, ironically, would be "superfluous" under XO's arguments respecting SBC Issue 12), having found SBC's similar provision acceptable (under SBC Issue 12), we reach the same conclusion here⁶².

We note that the proposed texts of the arbitrating parties account for the possibility that U.S. Supreme Court action could affect USTA II and, by extension, the TRO. In our view, any such action by the Supreme Court would now constitute a change of law that would have to be incorporated into the ICA, as appropriate, through the existing change-of-law provisions.

14. Should SBC be required to report and pay performance measures when a UNE is declassified?

1. Parties' Positions and Proposals

a). SBC

SBC Illinois' performance measures plan and remedies, previously approved by the Commission, is intended to ensure that SBC Illinois satisfies its obligations regarding the provision of UNEs to competitors. To the extent a network element is no longer a section 251 UNE, that plan and those remedies no longer apply. SBC Illinois' proposed language, which makes this consequence of UNE declassification expressly clear, is thus reasonable and appropriate, and should be adopted. Moreover, as explained above, the Commission should reject XO's unlawful suggestion that the Commission should require SBC Illinois to continue providing non-UNEs at the same rates, terms, and conditions as UNEs pursuant to section 271.

⁶² If it chooses, XO is free to abandon this provision in the final text of the parties' amended ICA.

b.) XO

As an initial matter, for the same reasons discussed above, XO disagrees with SBC's definition of "declassified" UNEs and "lawful UNEs." Furthermore, nothing in the *TRO* relieves SBC of its obligation to meet performance measures and pay penalties, simply because a UNE is no longer required to be unbundled under Section 251. SBC still must provide nondiscriminatory service under the Act, and comply with its Section 271 requirements, which include performance measures and penalties. Accordingly, SBC's proposed language is inappropriate and XO's language should be incorporated into the Amendment.

c.) Staff

SBC's characterization of this issue is almost completely inaccurate. SBC is obliged, under the Commission's Section 271 Order, to continue to pay performance remedy penalties. The whole purpose of a performance remedy plan is to make certain that a regional Bell operating company (hereafter "RBOC") continues to keep its market open after it receives authority to provide interexchange service under Section 271 of the federal Telecommunications Act of 1996. SBC is obligated by its existing performance remedy plan, approved by the Commission in its Section 271 Orders.

2. Analysis and Conclusions

The Commission rejects SBC's proposed Section 7. It is an attempt to remove Section 271 network elements from the operation of the performance remedy plan adopted in connection with SBC's long distance approval under Section 271 (insofar as that plan is identified in the parties' ICA). As Staff aptly states, the performance remedy plan is a "Commission-approved bulwark against SBC's potential failure to honor its market-opening obligations after receiving Section 271 authority." Staff Reply Br. at 39.

SBC's contention, at SBC Reply Br. at 65, that network elements are fundamentally different under, respectively, Sections 251 and 271, is incorrect in the context of the performance remedy plan. That plan is intended to create disincentives to SBC failure to perform its pro-competitive obligations, irrespective of the specific statute, regulation or order that imposes any particular such obligation.

V. GENERAL APPLICATION OF THE STATUS QUO ORDER

In addition to its specific impact on certain issues in this arbitration, the Status Quo Order is also generally applicable to the parties and must be reflected in their ICA. Its salient provisions are associated with the Interim Period and Transition Period previously discussed here, and with a "Post-Transition Period" also defined in that order. The Interim Period will last for six months, unless the FCC issues final unbundling rules before that time. During that six-month period, existing ICA terms for mass market switching, dedicated transport and enterprise loops can only be superseded by voluntarily negotiated agreements, FCC orders specifically addressing

those UNEs, or state commission orders raising UNE rates. Either of the latter two events would constitute a change of law that should be addressed by the ICA's change-of-law processes.

The Transition Period covers the six months immediately following termination of the Interim Period. However, there will be no Transition Period for any of the aforementioned UNEs that the FCC determines should continue to be available under Section 251 of the Federal Act. But without such a determination, the following directives apply:

First, in the absence of a Commission ruling that switching is subject to unbundling, an incumbent LEC shall only be required to lease the switching element to a requesting carrier in combination with shared transport and loops (*i.e.*, as a component of the "UNE platform") at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004 plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and six months after Federal Register publication of this Order, for this combination of elements plus one dollar. Second, in the absence of a Commission ruling that enterprise market loops and/or dedicated transport are subject to section 251(c)(3) unbundling in any particular case, an incumbent LEC shall only be required to lease the element at issue to a requesting carrier at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for that element on June 15, 2004, or (2) 115% of the rate the state public utility commission establishes, if any, between June 16, 2004, and six months after Federal Register publication of this Order, for that element. With respect to all elements at issue here, this transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates. As during the interim period, carriers shall remain free to negotiate alternative arrangements (including rates) superseding our rules (and state public utility commission rates) during the transition period. Subject to the comments requested in response to the above NPRM, we intend to incorporate this second phase of the plan into our final rules.

Status Quo Order, ¶ 29.

The foregoing transitional unbundling and pricing requirements should be incorporated into the SBC/XO ICA through the instant amendment. As a result, these requirements will not constitute changes of law when they occur. Similarly, it would not be a change of law if the FCC, in its final rules, determines that its unbundling requirements for a pertinent UNE will remain as they are presently. Any other future FCC or state requirement affecting the relevant switching, loop and transport UNEs may constitute a change of law to be addressed by ICA change-of-law mechanisms.

Additionally, we note that the transitional unbundling and pricing requirements apply only to a CLEC's "embedded customer base" and not to new customers. *Id.* Therefore, the law applicable to new customers may change before the law applicable to existing customers, and that change could trigger the ICA change-of-law provisions.

In the Post-Transition Period, the FCC's final rules will determine which UNEs must be unbundled and establish the terms and conditions for unbundling. "The specific process by which those rules shall take effect will be governed by each [ILEC's ICAs] and the applicable state commission's processes." *Id.* Presumably, if the substantive provisions of the ICA are inconsistent with the FCC's final rules, ICA change-of-law processes will apply.

VI. ARBITRATION STANDARDS

Under subsection 252(c) of the Federal Act, the Commission is required to resolve open issues, and impose conditions upon the parties, in a manner that comports with three standards. The Commission holds that the analysis in this arbitration decision satisfies that requirement.

First, subsection 252(c)(1) directs the state commissions to "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." In this arbitration, the Commission has directed the parties to include provisions in their interconnection agreement that fully comport with Section 251 requirements and FCC regulations.

Second, subsection 252(c)(2) requires that we "establish any rates for interconnection, services or network elements according to subsection [252(d)]." Here, most of the pertinent rates were already established by the parties through mutual agreement. Insofar as the Commission's resolution of open issues will affect those or other rates in the parties' interconnection agreement, we require, and expect the parties to establish, rates that are in accord with subsection 252(d) of the Federal Act.

Third, pursuant to subsection 252(c)(3), the Commission must "provide a schedule for implementation of the terms and conditions by the parties to the agreement." Therefore, the Commission directs that the parties file, within 25 calendar days of the date of service of this arbitration decision, their complete interconnection agreement for Commission approval pursuant to subsection 252(e) of the Federal Act.

By Order of the Commission this 28th day of October, 2004.

(SIGNED) EDWARD C. HURLEY

Chairman

Attachment D

ARBITRATION OF NON-COSTING
ISSUES FOR SUCCESSOR
INTERCONNECTION AGREEMENTS
TO THE TEXAS 271 AGREEMENT

§ 2004 SEP 9 PM 4:09
PUBLIC UTILITY COMMISSION
§ PUBLIC UTILITY COMMISSION
§ FILING CLERK
§ OF TEXAS

ORDER ABATING TRACK 2

On August 20, 2004, the Federal Communications Commission (FCC) issued a Notice of Proposed Rulemaking (NPRM) and Order containing interim rules.¹ In that order, the FCC laid out a two-phase, 12-month plan to stabilize the telecommunications market. The first phase requires ILECs, on an interim basis, to:

[C]ontinue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (e.g., an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements.²

The second phase sets forth transitional unbundling measures for six months after the first phase ends:

[I]n the absence of a Commission holding that particular network elements are subject to the unbundling regime, those elements would still be made available to serve existing customers for a six-month period, at rates that will be moderately higher than those in effect as of June 15, 2004.³

In response to a request by the Arbitrators, on August 26, 2004, the parties filed pleadings addressing the question of how the Commission should proceed with the Track 2 issues in light of the Interim Rules.

¹ *In the Matter of Unbundled Access to Network Elements; Review of the § 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, CC Docket No. 01-338, WC Docket No. 04-313 (rel. Aug. 20, 2004) (Interim Rules).

² Interim Rules at ¶1.

³ *Id.*

SBC Texas argued that there should be no delay in the processing of Track 2. SBC Texas argued that the Commission should move forward under the change of law provisions specifically outlined by the FCC in paragraph 22 of the order. Moreover, the Texas 271 Agreement (T2A) expires on February 17, 2005.

The Joint CLECs recognized that Track 2 could proceed, but that if it does, the Commission would not have the guidance of any rules from the FCC. Thus, the Commission would be required to do its own impairment analysis, which would be an enormous undertaking. The Joint CLECs stated that abating Track 2 is the more practical approach.

MCI and the CLEC Joint Petitioners (CJP) urged the Commission to abate Track 2. Both argued that proceeding without permanent rules is a waste of resources.

The Commission determines that Track 2 should be abated pending the issuance of permanent rules by the FCC. The FCC's order recognizes that disputes relating to the provisioning of UNEs "would be wasteful in light of the [FCC's] plan to adopt new permanent rules as soon as possible."⁴ Thus, in order to conserve both the parties' and the Commission's resources, the Commission finds that the more appropriate course of action is to abate Track 2 and wait for guidance from the FCC.

⁴ Interim Rules at ¶18.

SIGNED AT AUSTIN, TEXAS the 9th day of September 2004.

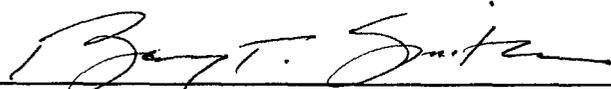
PUBLIC UTILITY COMMISSION OF TEXAS



JULIE PARSLEY, COMMISSIONER



PAUL HUDSON, CHAIRMAN



BARRY T. SMITHERMAN, COMMISSIONER

Attachment E

Arbitrators' Decision

The Arbitrators find that CLECs are impaired without access to local switching as a UNE. SWBT is therefore required to provide unbundled local switching. Moreover, the imposition of this requirement is not contrary to the terms of the UNE Remand Order.

The FCC's Exception Is Not Applicable

*According to the FCC, incumbent local exchange carriers (ILECs) must provide local switching as an unbundled network element (UNE) "except for local circuit switching used to serve end users with four or more lines in access density zone 1 in the top 50 Metropolitan Statistical Areas (MSAs), provided that the ILEC provides nondiscriminatory, cost-based access to the enhanced extended link (EEL) throughout zone 1."³⁷¹ The FCC's decision to carve out an exception to the requirement that ILECs provide local switching as a UNE is expressly predicated on the availability of the EEL,³⁷² and the exception is therefore triggered **only** when the ILEC provides nondiscriminatory, cost-based access to the EEL.*

The Arbitrators find that SWBT has failed to prove that it provides nondiscriminatory cost-based access to the EEL. Indeed, SWBT conceded that it does not provide nondiscriminatory access to the EEL, and therefore the exception does not apply.³⁷³ In addition, MCI_m presented unrefuted evidence that SWBT has obstructed MCI_m's attempt to obtain EELs.³⁷⁴ The Arbitrators note that SWBT has not asked the FCC or the Commission to determine that any Texas market qualifies for the UNE Remand Order EEL exception. Because the express condition precedent to the application of the exception has not been met, the Arbitrators conclude that the exception is not now applicable and SWBT is required to provide unbundled local switching (ULS) throughout Texas without exception.

³⁷¹ UNE Remand Order ¶ 12.

³⁷² *Id.* ¶ 288.

³⁷³ SWBT Exh. No. 10, Hampton Rebuttal at 15 ("[T]he exception only applies when an ILEC provides CLECs with access to EELs, which SWBT has chosen not to do to date."). *See also* Tr. at 291 (SWBT witness stated that the EEL is available, but on a discriminatory basis to CLECs that opted into the T2A.).

³⁷⁴ MCI_m Exh. No. 1, Price Direct at 54-55.

Commission Oversight of EEL Implementation

The Arbitrators conclude that finding only that the FCC's exception to unbundled local switching has not been triggered does not reach SWBT's proposal to include in the interconnection agreement language reflecting the exception and threatens to leave unanswered questions that could diminish market certainty. Therefore, the Arbitrators further find that implementation of the EEL requires Commission oversight to ensure that the EEL is properly available, and that CLECs have an adequate opportunity to transition to market based pricing or to seek alternative providers of local switching. Consequently, the Arbitrators decline to adopt SWBT's proposed contract language.

The Arbitrators note that compelling and unrefuted evidence was presented that the EEL may, in fact, be cost prohibitive for CLECs.³⁷⁵ SWBT also had provided the FCC with evidence that, over time, distance-sensitive EEL costs can exceed the cost of collocation.³⁷⁶ The Arbitrators find, therefore, that if and when SWBT desires to invoke an FCC carve out or exception to treating LS as a UNE, SWBT has the burden of initiating a proceeding before the Commission for that purpose. The Commission will then provide oversight of the proposed EEL transition, and evaluate the applicability of any FCC carve out in effect at that time. This process will allow all interested parties to present evidence on whether the exception should be applied as proposed by the FCC or in some other manner, consistent with FCC guidance and the state of the applicable law at that time. The Arbitrators therefore decline to adopt either SWBT's proposed section 5.4 or MCI's proposed section 14.3.1.1, and have instead adopted language consistent with this discussion, as reflected in the attached contract matrix.

Commission Review of FCC Exception's Applicability in Texas

The Arbitrators accord considerable deference to the FCC's broad national perspective and significant experience and expertise. Indeed, the Arbitrators depart from the FCC's conclusions only where circumstances specific to Texas appear to differ from those addressed by the FCC. The Arbitrators believe that the FCC's exception to ULS may be such an instance.

³⁷⁵ MCI's stated that a two-wire voice grade EEL costs 49% more in recurring charges (\$18.06 rather than \$12.14, on average) and 3,598% more in nonrecurring charges (\$44.01 rather than \$1.19, on average) than the same loop if instead combined with unbundled switching. MCI's Exh. No. 3, Turner Direct at 24-25.

³⁷⁶ UNE Remand Order ¶ 289, n.572.

Both the facts before the FCC in September 1999, when the UNE Remand Order was issued, and the factual circumstances in Texas today raise questions regarding the applicability of the exception in Texas at this time. In its UNE Remand Order, the FCC explained that without access to ULS, CLECs are impaired in their ability to serve the mass market.³⁷⁷ The FCC also concluded that, to the extent that CLECs are not serving a market segment with self-provisioned switches, there is probative evidence of impairment; hence, the FCC stated that the above-mentioned exception would serve as a “proxy” by which to determine “when competitors are impaired in their ability to provide the services they seek to offer.”³⁷⁸

In creating the subject exception, the FCC conceded that the use of a 3-line rule in removing unbundling obligations from an ILEC could be somewhat under or over-inclusive given individual factual circumstances, and could therefore fail to accurately draw the distinction between the mass market and the medium and large business markets.³⁷⁹ The FCC acknowledged that no party to its proceeding identified the “characteristics that distinguish medium and large business customers from the mass market.”³⁸⁰ Consequently, the FCC relied at least in part on a letter submitted by Ameritech indicating that, in September 1999, the market segment for business customers with three lines or less accounted for approximately 72% of Ameritech’s business customer base.³⁸¹ Thus, the FCC concluded that “a rule that provides unbundled local switching for carriers when they serve customers with three lines or less captures a significant portion of the mass market.”³⁸²

The Arbitrators are reluctant to rely solely on this 2½-year old letter to determine whether or not to require SWBT to provide ULS in Texas. First, owing to the manner in which the FCC gathers information, there are evidentiary questions that would arise if the letter was introduced in this proceeding.³⁸³ Second, the Arbitrators have concerns regarding the content of

³⁷⁷ *Id.* ¶¶ 291, 294.

³⁷⁸ *Id.* ¶ 276.

³⁷⁹ *Id.* ¶ 294.

³⁸⁰ *Id.*

³⁸¹ *Id.* at n.580.

³⁸² *Id.* ¶ 293.

³⁸³ Ameritech apparently filed the letter on an *ex parte* basis very late in the proceeding, without verification or attestation; the validity of the claims in the letter were not tested through any cross-examination.

the letter. If the analysis of the mass market is performed on the basis of the total number of business customers' lines in Ameritech's market, the information presented by Ameritech would leave less than 34% of the total business lines within the so-called mass market.³⁸⁴ Given the questions reasonably addressed to the fallibility of the Ameritech data, the Arbitrators would hesitate to adopt a mass market definition that, based on Ameritech data, might place the vast majority of Texas business customers' lines outside of that definition, and therefore outside the benefits afforded by ULS.

In addition, the Arbitrators find the evidence in this proceeding does not suggest that a 3-line exception in Texas would differentiate among "discrete market segments or customer classes," as the FCC sought to do by establishing its standard. Indeed, the evidence suggests that SWBT is unclear as to the process by which it would accurately and consistently count lines for the purposes of invoking the exception.³⁸⁵ Based on the evidence in this docket, the Arbitrators are unable to conclude that the application of a 3-line test provides a measure of the mass market in Texas that is accurate and practicable.

The Arbitrators concur with the FCC's observation that there are "several methods [it] could use to distinguish between the mass market and medium and large business market."³⁸⁶ The FCC specifically noted that "revenues, number of employees, number of lines, or some other factor" could be used to draw the distinction.³⁸⁷ The Arbitrators find some consensus among the CLECs that, if a bright line is to be drawn, it might be drawn so as to limit the availability of local switching for customers served at the digital DS-1 level or above.³⁸⁸ Indeed, the CLEC

³⁸⁴ Letter from James K. Smith, Director – Federal Relations, Ameritech, to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Sept. 8, 1999) (estimated total business access lines calculated using Ameritech Business Customer Base by Linesize).

³⁸⁵ Tr. at 357.

³⁸⁶ *UNE Remand Order* ¶ 292.

³⁸⁷ *Id.*

³⁸⁸ For example, a DS-1 (rather than "four lines") is the smallest capacity circuit MCI uses with its own switch to provide local service to business customers. MCI presented evidence that this strategy provides ease of channelization and configurability of bandwidth, that a DS-1 is typically the minimum circuit used with a PBX, and that PBX vendors are often onsite to help ensure cutover goes smoothly. Customers without PBXs and without such support thus have a smaller safety net in case cutover goes badly. MCI Exh. No. 1, Price Direct at 58-59. The Arbitrators use the phrase "digital DS-1" to include only those lines that are provisioned as DS-1s, rather than those that result from the aggregation of analog voice grade lines.

*Coalition conceded that it would be reasonable to assume non-impairment for high-speed digital customers in the four largest markets in Texas, once SWBT is providing the EEL.*³⁸⁹

However, the Arbitrators acknowledge that indicators of impairment based on the number or type of lines used by particular customers (i.e., 3-4 analog lines, digital DS-1) appear to reflect only potential gross revenue available from that customer, while failing to measure CLEC assets and the strength of either competition or of a particular competitor – factors SWBT contends are determinative of whether a CLEC should be required to deploy facility-based services. Although the Arbitrators agree that CLEC strength may be a valid consideration, the Arbitrators disagree with SWBT that the sole standard for removing unbundled switching is the ability of CLECs to self-supply switching.³⁹⁰ Even if this were so, however, the Arbitrators find that determining the number of CLEC-owned switches, a seemingly simple factual matter, was the source of considerable dispute in this proceeding.³⁹¹ The uncertainty over counting customer lines and CLEC-owned switching lends further support for Commission supervision of SWBT's assertion of the applicability of an exception to the unbundling requirement.

SWBT Must Provide ULS in Zones 1, 2, and 3

Although the FCC created an exception to the general requirement of ULS, the exception is geographically limited in scope to lines located within density zone 1 in the top 50 MSAs. As SWBT concedes, the FCC has determined that, generally, ILECs must provide unbundled access to local switching.³⁹² The FCC has found that lack of access to ULS materially raises entry costs, delays broad-based entry, and limits the scope and quality of new entrants' service offerings.³⁹³ Therefore, the FCC concluded that ULS meets the impairment standard, and requires ILECs to provide local switching on an unbundled basis.³⁹⁴

³⁸⁹ Coalition Exh. No. 1, Gillan Direct at 43-44.

³⁹⁰ SWBT Exh. No. 7, Fitzsimmons Rebuttal at 27. The FCC also considered third-party ULS suppliers, but found that its record could not support a finding that CLECs can obtain switching from any carriers other than the ILEC. *UNE Remand Order* ¶ 253.

³⁹¹ See Tr. at 253-71, 318; Coalition Exh. No. 3, Ivanuska Direct at 10-11, 13.

³⁹² *UNE Remand Order* ¶ 253. An ILEC must provide nondiscriminatory access to local circuit switching capability and local tandem switching capability on an unbundled basis, except as set forth in § 51.319(c)(2). 47 C.F.R. § 51.319(c) (2001). See also SWBT's Initial Brief at 5.

³⁹³ *UNE Remand Order* ¶ 252.

³⁹⁴ *Id.*

Nevertheless, as explained below, the Arbitrators decline to rely solely on the FCC's determination regarding ULS.³⁹⁵ Instead, the Arbitrators independently find that CLECs would be impaired in zones 1, 2, and 3 in Texas if local switching were not available as a UNE.³⁹⁶ Therefore, even if in its Triennial UNE Review proceeding the FCC were to remove local switching from the national list, or create a new exception standard, the Arbitrators nonetheless find that on this specific factual record CLECs in Texas would be impaired without the availability of local switching on an unbundled basis.

CLECs Would Be Impaired Without Access to ULS.

The Arbitrators considered the evidence in light of each of the factors specified in 47 C.F.R. § 51.317: cost; timeliness; ubiquity; impact on network operations; rapid introduction of facilities; facilities-based competition; investment and innovation; certainty to requesting carriers regarding availability; administrative practicality; and reduced regulation.

The Arbitrators find that fixed infrastructure costs — including the switch itself, electronic interfaces, collocation arrangements, provisioning, and cutovers — associated with providing service to residential and small business customers remain a barrier to market entry unless the CLEC is able to generate sufficient economies of scale in a given market, which is achieved in part through serving large business customers through UNE-P.³⁹⁷ Sage presented unrefuted evidence that UNE-P provided the most, and perhaps only, viable entry strategy for the company to serve rural and suburban zones.³⁹⁸

In addition, the Arbitrators find that the delay and expense associated with deploying facilities and capturing a significant scale of customers using their own facilities remains a time-

³⁹⁵ Given the FCC's determination, it would be unnecessary, in a vacuum, for the Commission to determine whether local switching must be unbundled. See, e.g., *In re Generic Proceeding to Establish Long-Term Pricing Policies for Unbundled Network Elements*, Docket No. 10692-U, Order at 5 (Georgia PSC Feb. 1, 2000) (*Georgia UNE Pricing Order*) ("For UNEs on the national list, there is no need . . . to consider the necessary and impair standard since the FCC already made that determination."). However, because SWBT seeks to have language included in the interconnection agreement that incorporates the FCC exception, the Arbitrators have conducted an impairment analysis.

³⁹⁶ For the purpose of this analysis, the Arbitrators follow the FCC usage of zone 1 to indicate highest density, even though this Commission has historically designated zone 1 as the least dense zone.

³⁹⁷ See Coalition Exh. No. 1, Gillan Direct at 34-37; Coalition Exh. No. 2, Gillan Rebuttal at 16-19; Coalition Exh. No. 3, Ivanuska Direct at 6-7, 12-13; Coalition Exh. No. 5, Burk Direct at 5; MCI Exh. No. 1, Price Direct at 56-57; MCI Exh. No. 3, Turner Direct at 21-25.

consuming process for CLECs that takes years.³⁹⁹ The Arbitrators also conclude that non-ILEC ULS is clearly not ubiquitously available. For example, both SWBT and the CLECs presented clear cut evidence that no non-ILEC switch-based provider offers wholesale local switching in any market in Texas.⁴⁰⁰ The Arbitrators are concerned with SWBT's clear lack of preparation to integrate in any administratively practical or meaningful way local switching obtained by a CLEC from a third-party with SWBT's network.⁴⁰¹ Likewise, the Arbitrators are also concerned with the potential detrimental impact on network operations that provisioning large numbers of small orders may have on SWBT's network.⁴⁰²

The Arbitrators are not persuaded by SWBT's arguments that UNE-P would create a disincentive to investment and innovation, or that the FCC based its unbundling analysis solely on the ability of CLECs to self-supply switching in the largest markets without considering the availability of switching from other providers.⁴⁰³ The Arbitrators find that lack of non-ILEC ULS would hinder the rapid deployment of facilities, as well as investment in innovative technologies and product offerings.⁴⁰⁴ The Arbitrators are also concerned with statements by the CLECs that if ULS were not available, they would simply stop serving customers.⁴⁰⁵ The Arbitrators conclude that inclusion of SWBT's proposed language would create a lack of

³⁹⁸ Sage Exh. No. 1, Nuttall Direct at 40-44.

³⁹⁹ See MCIIm Exh. No. 1, Price Direct at 57; MCIIm Exh. No. 2, Price Rebuttal at 13-14, 16; Coalition Exh. No. 1, Gillan Direct at 38; Sage Exh. No. 1, Nuttall Direct at 40-41, 47.

⁴⁰⁰ See Coalition Exh. No. 3, Ivanuska Direct at 10-11; Coalition Exh. No. 5, Burk Direct at 7; MCIIm Exh. No. 3, Turner Direct at 18, 20-21; SWBT Exh. No. 8, Fitzsimmons Rebuttal at 30; Tr. at 281-82.

⁴⁰¹ Tr. at 341-44.

⁴⁰² CLECs expressed particular concern regarding this issue. See Tr. at 103; MCIIm Exh. No. 1, Price Direct at 58-59; Coalition Exh. No. 3, Ivanuska Direct at 12.

⁴⁰³ Tr. at 324; SWBT Exh. No. 8, Fitzsimmons Rebuttal at 30.

⁴⁰⁴ Both Birch and MCIIm expressed concern that lack of ULS could *de facto* require CLECs to invest in "legacy" equipment reflecting current technologies, which may soon be obsolete, instead of in *innovative* next generation network architecture, which may afford greater technical and economic efficiencies. See MCIIm Exh. No. 2, Price Rebuttal at 15-16; Coalition Exh. No. 3, Ivanuska Direct at 8-10. Birch is also currently testing soft switching equipment with SWBT, and plans to deploy a softswitch in Kansas City next year depending on two factors: success of the testing, and opening up of the capital markets for financial investments. Tr. at 368-369. According to Sage, ULS allows it to offer unique and innovative product offerings to its rural and suburban customers rather than mirroring SWBT's services through resale. Sage Exh. No. 1, Nuttall Direct at 34.

⁴⁰⁵ According to MCIIm, lack of ULS will hinder competition. MCIIm Exh. No. 3, Turner Direct at 22-23. MCIIm stated that, not only would it stop serving its customers rather than invest in facilities, it may go out of business. Coalition Exh. No. 5, Burk Direct at 6-7. Birch stated that it would have to reevaluate the cost of serving customers affected by the UNE exception. Tr. at 355.

certainty. Sage and Birch were particularly concerned that this would result in the loss of investor confidence, and the CLEC Coalition stated that this was a primary concern for the CLECs.⁴⁰⁶

The Arbitrators find valid today the FCC's observation in the UNE Remand Order — “[I]t is too early to know whether self-provisioning is economically viable in the long run”.⁴⁰⁷ Therefore, the Arbitrators conclude that CLECs in Texas would be impaired without unbundled local switching from the ILEC. The Arbitrators have adopted language shown in the attached contract matrix that provides for continued ULS until and unless a subsequent determination by the Commission.

DPL ISSUE NO. 8a

CLECs: Is there competitive merit, and is it in the public interest, for local switching to be available as a network element?

SWBT: Is SWBT required to provide local switching as a UNE contrary to the UNE Remand Order?

CLECs' Position

a. MCI

MCI argued that the fragile competition that exists for residential and small business customers is based on UNE-P, and SWBT's ultimate goal of eliminating the switching UNE would eliminate broad-based competition for these customers in Texas.⁴⁰⁸ MCI stated that one critical factor in support of policies encouraging geographically broad-based competition is PURA § 54.251(a)(1), which imposes on CLECs holding Certificates of Operating Authority an obligation to offer basic local telecommunications service to any and all persons who request such service within the area for which the CLEC is certified.⁴⁰⁹ MCI stated that CLECs simply cannot today operationally or financially compete for residential or small business customers on

⁴⁰⁶ Coalition Exh. No. 1, Gillan Direct at 57, Coalition Exh. No. 3, Ivanuska Direct at 13, Sage Exh. No. 1, Nuttall Direct at 42.

⁴⁰⁷ UNE Remand Order ¶ 256.

⁴⁰⁸ MCI Exh. No. 2, Price Rebuttal at 2-3.

⁴⁰⁹ *Id.* at 8.

discount; and 3) accomplish all of this without investing \$1 in network facilities or adding value with service innovations.⁴⁷¹

SWBT stated that competitive merit is the net benefit of subtracting out cost from the gross benefit.⁴⁷² SWBT argued that UNE-P may generate some benefits, but the unintended and undesirable effect of discouraging more rapid investment in competing modes of communications should be netted out.⁴⁷³ SWBT also argued that the availability of UNE-P is incompatible with the incentive for investing in infrastructure. SWBT agreed, however, that substantial infrastructure investments have been made while UNE-P has been available as an entry strategy. SWBT clarified that the tension is between UNE-P and infrastructure investment in the analog loop.⁴⁷⁴

Arbitrators' Decision

PURA § 60.021 requires, at a minimum, that an ILEC unbundle its network to the extent required by the FCC. PURA § 60.022(a) allows the Commission to adopt an order relating to the issue of unbundling of local exchange company services in addition to the unbundling required by § 60.021. PURA § 60.022(b) requires the Commission to consider the public interest and competitive merits before ordering further unbundling. Additionally, P.U.C. SUBST. R. 26.272(a) requires the Commission to ensure that all providers of telecommunications services interconnect in order that the benefits of local exchange competition are realized. In adopting this rule, the Commission determined that interconnection is necessary to achieve competition in the local exchange market and is, therefore, in the public interest.

The Arbitrators' decision requiring SWBT to continue to provide unbundled local switching does not appear to exceed the requirements established by the FCC. However, because the Arbitrators declined to include in the parties' interconnection agreement language SWBT asserted would implement the FCC's exception to ULS, the Arbitrators also conclude that there is competitive merit in requiring SWBT to provide unbundled local switching. The competitive merit or benefits include providing consumers with the ability to choose alternative

⁴⁷¹ *Id.* at 13-14.

⁴⁷² Tr. at 339.

⁴⁷³ *Id.*

Attachment F

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of Level 3)
 Communications, LLC for Arbitration of an) Case No. 04-940-TP-ARB
 Amendment to an Interconnection)
 Agreement with Ohio Bell Telephone)
 Company d/b/a SBC Ohio.)

ENTRY

The Attorney Examiner finds:

- (1) On June 15, 2004, Level 3 Communications, LLC (Level 3) filed a petition to arbitrate the terms of an interconnection agreement with Ohio Bell Telephone Company d/b/a SBC Ohio (SBC).
- (2) By entry on June 22, 2004, the Attorney Examiner scheduled a conference in this matter for July 12, 2004, at 1:00 p.m. at the offices of the Commission in Hearing Room 11-B. The entry included a proposed case schedule to be discussed at that conference.
- (3) On July 1, 2004, the Attorney Examiner was contacted jointly by counsel for Level 3 and SBC to request that the July 12, 2004 conference and the proposed case schedule be stayed. The parties, through their counsel, requested that they have the month of July to continue informal settlement discussions. The parties proposed to submit a revised case schedule, at the beginning of August 2004, for any remaining issues.
- (4) By entry issued July 2, 2004, the Attorney Examiner granted the postponement and stayed the proposed case schedule.
- (5) On July 12, 2004, SBC filed its response to the petition for arbitration. On August 18, 2004, the parties filed a joint revised disputed point list and joint proposed interconnection agreement. On August 30, 2004, the parties filed a supplement to the joint revised disputed point list and joint proposed interconnect agreement.
- (6) On September 3, 2004, a case status teleconference was conducted between the Arbitration Panel and the parties. During that conference call, the Arbitration Panel confirmed that issues submitted for arbitration in the original petition had been changed and/or new issues had been included in the August 18 and 30, 2004 filings. The parties stated that the

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changes and/or addition were the result of the ongoing negotiations between the parties, which involve thirteen states including Ohio. The Arbitration Panel noted that the disputed point lists were submitted in a variety of formats, without common references, and were, therefore, difficult to use. The parties were requested to submit a single revised disputed point list that clarified the sections of the proposed interconnection agreement in dispute, and that limited the issues to those that may impact Ohio customers. The parties agreed to submit the joint revised disputed point list by September 30, 2004.

- (7) On September 30, 2004, the parties submitted a "supplement to joint revised disputed point list." The parties stated that this single document includes all of the disputed issues displayed in the August 18 and 30, 2004 disputed point lists. Further, the parties stated that if the Commission resolves all of the issues displayed in this filing, it will have resolved all of the issues set forth for arbitration in this case, and will have discharged its responsibility as arbitrator under Section 252(b) of the Telecommunications Act of 1996. The parties recommended that the Arbitration Panel adopt the following proposed case schedule:

Level 3 Direct:	November 12, 2004
SBC Rebuttal:	December 10, 2004
Hearing:	January 17, 2004

Both Level 3 and SBC consented to extending the arbitration window and the time frame for the issuance of a Commission order on the arbitration petition, provided for under Section 252 of the Federal Telecommunications Act noted above.

- (8) After review of the September 30, 2004 filing, by the Arbitration Panel, the Attorney Examiner finds that the Arbitration Panel under the Federal Communication Commission's (FCC) existing rules, cannot resolve all of the disputed issues raised by the parties. For example, approximately 26 per cent of the issues presented on the revised joint disputed point list concern unbundled network elements (UNEs) for which there are no current rules. To conduct a hearing under these circumstances would lead to an incomplete resolution of the issues. Therefore, the Arbitration Panel will not adopt the recommended dates for the balance of this proceeding.

- (9) The FCC has indicated that it anticipates issuing new rules governing UNEs.¹ Due to the uncertainty of the timing of the new UNE rules, the Attorney Examiner finds that this proceeding should be stayed until three months after the FCC Order addressing the UNE rules is released. The parties are directed to file a revised disputed point list, for hearing by the Arbitration Panel, no earlier than three months after the FCC order is released. The Attorney Examiner will issue another entry, after the FCC order is released, setting a prehearing conference to establish the procedural schedule for this matter.

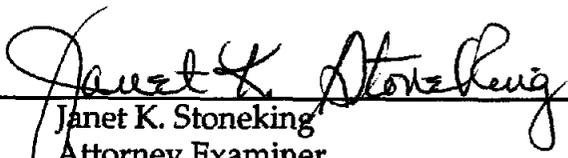
It is, therefore,

ORDERED, That, in accordance with Finding (9), this proceeding shall be stayed until three months after the FCC order addressing UNE rules is released. It is, further,

ORDERED, That, in accordance with Finding (9), the parties shall submit a revised disputed point list, for hearing by the Arbitration Panel, no earlier than three months, after the FCC order addressing UNE rules is released. It is, further,

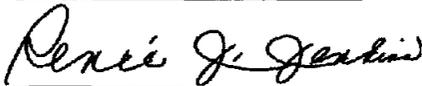
ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: 
Janet K. Stoneking
Attorney Examiner

/ct
Entered in the Journal

NOV 15 2004



Renee J. Jenkins
Secretary

¹ On August 20, 2004, the FCC issued its Order and Notice of Proposed Rulemaking in WC Docket No. 04-313, *In the Matter of Unbundled Access to Network Elements*, and CC Docket 01-338, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*.

Attachment G



STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

**DOCKET NO. 03-01-02 PETITION OF GEMINI NETWORKS CT, INC. FOR A
DECLARATORY RULING REGARDING THE SOUTHERN
NEW ENGLAND TELEPHONE COMPANY'S UNBUNDLED
NETWORK ELEMENTS**

December 17, 2003

By the following Commissioners:

Jack R. Goldberg
John W. Betkoski, III
Donald W. Downes

DECISION

TABLE OF CONTENTS

I.	INTRODUCTION	1
A.	SUMMARY	1
B.	BACKGROUND OF THE PROCEEDING	1
C.	CONDUCT OF THE PROCEEDING	2
D.	PARTIES AND INTERVENORS	3
II.	PETITION	3
III.	POSITIONS OF PARTIES AND INTERVENORS.....	4
A.	GEMINI NETWORKS CT, INC.	4
B.	THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY	13
C.	OFFICE OF CONSUMER COUNSEL.....	19
D.	OFFICE OF THE ATTORNEY GENERAL.....	23
IV.	DEPARTMENT ANALYSIS.....	24
A.	INTRODUCTION	24
B.	HFC NETWORK HISTORY	24
C.	FEDERAL AND STATE UNBUNDLING REQUIREMENTS	28
1.	Telcom Act.....	28
2.	Triennial Review Order	32
3.	Connecticut Statutes.....	33
4.	Conclusion	34
D.	HFC NETWORK DISPOSITION PLAN.....	43
E.	TELCO AND GEMINI INTERCONNECTION AGREEMENT	44
V.	FINDINGS OF FACT AND CONCLUSIONS OF LAW	45
VI.	CONCLUSION AND ORDERS	49
A.	CONCLUSION	49
B.	ORDERS.....	49

DECISION

I. INTRODUCTION

A. SUMMARY

Gemini Networks CT, Inc. (Gemini) has requested by Petition dated January 2, 2003 (Petition) that the Department of Public Utility Control (Department) issue a Declaratory Ruling finding that certain hybrid fiber coaxial facilities (HFC) owned by the Southern New England Telephone Company (Telco or Company) be deemed unbundled network elements (UNE) and be offered on an element by element basis to Gemini at total service long run incremental cost (TSLRIC) pricing. The Office of Consumer Counsel (OCC) and the Office of the Attorney General (AG) support the Petition. The Telco opposes the Petition in that it argues, inter alia, that the HFC facilities in question are not subject to unbundling.

In this Decision, the Department has determined that the HFC facilities in question are subject to unbundling. The Department also concludes that in order for Gemini to gain access to the HFC network UNEs, it must negotiate and enter into an interconnection agreement with the Telco pursuant to §§ 251 and 252 of the Telecommunications Act of 1996 (Telcom Act).

B. BACKGROUND OF THE PROCEEDING

By Petition received on January 2, 2003, Gemini¹ requested that the Department issue a declaratory ruling finding that certain hybrid fiber coaxial facilities owned by the Telco, formerly leased to SNET Personal Vision, Inc. (SPV), constitute UNEs and as such must be tariffed and offered on an element by element basis for lease to Gemini at total service long run incremental cost pricing. Should the Department determine that those facilities are UNEs subject to appropriate unbundling and pricing, Gemini also requested that the Department initiate a cost of service proceeding to determine the appropriate pricing structure for the elements, based on TSLRIC. Gemini further requested the Department direct the Telco to file an inventory of all plant formerly leased to SPV, including the condition of all such plant and the disposition of any plant no longer in place.²

¹ Gemini was awarded its Certificate of Public Convenience and Necessity (CPCN) to offer wholesale Internet Access service to three Connecticut towns by the Department's Decision dated September 1, 1999 in Docket No. 99-03-12, Application of Gemini Networks, Inc. for a Certificate of Public Convenience and Necessity. In the Decision dated January 17, 2001 in Docket No. 00-10-20, Application of Gemini Networks, Inc. to Expand its Certificate of Public Convenience and Necessity, Gemini was also granted facilities-based authority to provide wholesale telecommunications services throughout Connecticut. Additionally, by the Decision dated September 28, 2001 in Docket No. 01-06-22, Application of Gemini Networks, CT, Inc. To Expand its Certificate of Public Convenience and Necessity, Gemini was authorized to provide retail facilities-based and resold local exchange telecommunications services throughout Connecticut.

² Petition, p. 1.

In response to the Petition, the Telco requested that this proceeding be bifurcated.³ Specifically, the Telco requested that the first phase of this proceeding address the legal issues. The Telco stated that should the Department find in Gemini's favor on the legal issues in the first phase of the proceeding, then a second phase could be initiated to address Gemini's other requested relief. The Telco also proposed that the Petition be stayed pending the Federal Communications Commission's (FCC or Commission) decision in its Triennial Review Proceeding.⁴

In its February 10, 2003 response to the Telco Request, the Department concluded that the Petition was seeking a determination as to whether the HFC network was subject to unbundling pursuant to the General Statutes of Connecticut (Conn. Gen. Stat.) §16-247b(a). The Department also concluded that before these network facilities could be subject to arbitration (as provided for by §252 of the Telcom Act), a determination must first be made that the HFC facilities may be unbundled pursuant to Conn. Gen. Stat. §16-247b(a). Accordingly, the Department denied the Telco's request to dismiss the Petition. The Department also denied the Telco's request to stay its investigation pending the FCC's ruling in its Triennial Review Proceeding. Finally, the Department concluded that the Telco's proposal to bifurcate this proceeding into two phases with only the legal issues being addressed in phase one and addressing Gemini's request for a cost study and inventory in phase two, was of merit and established a procedural schedule to develop a record on which this Decision is based.

C. CONDUCT OF THE PROCEEDING

By Notice of Hearing dated March 10, 2003, and by Notice of Rescheduled Hearings dated May 29, 2003, the Department announced that hearings would be held on June 23, 2003 and June 24, 2003, at the Department's offices, Ten Franklin Square New Britain, Connecticut 06051. By Notice of Close of Hearing dated August 6, 2003, those hearings were cancelled.

On August 21, 2003, the FCC issued its order in Triennial Review Proceeding (TRO). In light of that order, the Department reopened the record of this proceeding and requested written comments and reply comments discussing the weight, if any, the TRO⁵ should be given by the Department as it addressed the Petition.⁶

³ Telco January 23, 2003 Letter to the Department (Telco Request), p. 1.

⁴ See CC Docket No. 01-339, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No. 96-98; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability (Triennial Review Proceeding).

⁵ The TRO achieved three primary goals. First it continues the Commission's implementation and enforcement of the Telcom Act's market-opening requirements by applying the experience the FCC has gained implementing that act. Second, the TRO applies unbundling as Congress intended: with a recognition of the market barriers faced by new entrants as well as the societal costs of unbundling. Third, the TRO established a regulatory foundation that seeks to ensure that investment in telecommunications infrastructure will generate substantial, long-term benefits for all consumers. TRO, ¶5. The FCC also states that the framework set forth in the TRO recognizes that this competition is taking place on an intermodal basis -- between wireline providers and providers of services on other platforms such as cable and wireless -- and on an intramodal basis among wireline providers with different business and operational plans. Id.

The Department issued its draft Decision in this docket on November 3, 2003. All parties were offered the opportunity to file written exceptions and present oral argument concerning the draft Decision.

D. PARTIES AND INTERVENORS

The Department recognized the Southern New England Telephone Company, 310 Orange Street, New Haven Connecticut 06510; SNET Personal Vision, 310 Orange Street, New Haven Connecticut 06510; Gemini Networks CT, Inc., c/o Murtha Cullina, LLP, CityPlace I, 185 Asylum Street, Hartford Connecticut 06103-3469; and the Office of the Consumer Counsel, Ten Franklin Square, New Britain, Connecticut 06051, as parties to this proceeding. The Office of the Attorney General for the State of Connecticut and Cablevision Lightpath-CT, Inc. requested and were granted intervenor status to this proceeding.

II. PETITION

Gemini requested that the Department declare that certain Telco HFC facilities formerly leased to SPV constitute UNEs and as such, must be tariffed and offered on an element by element basis for lease to Gemini at TSLRIC pricing. Gemini also requested that in the event that these facilities are UNEs, that the Department immediately initiate a cost of service proceeding to determine the appropriate pricing structure, based on TSLRIC. Gemini further requested that the Department order the Telco to provide an inventory of all plant formerly leased to SPV including the condition of all such plant and the disposition of any plant no longer in place.⁷

Gemini claims that it has attempted to enter into negotiations with the Telco for lease of portions of the HFC facilities pursuant to state and federal law. Gemini also claims that the Telco refused to negotiate the lease of these facilities because the Telco did not consider these facilities as UNEs; and therefore, they were not subject to unbundling or regulation as unbundled network elements. Accordingly, Gemini requested the Department declare the HFC facilities to be UNEs so that it may re-enter negotiations with the Telco to obtain access to certain of the unbundled network elements pursuant to applicable pricing and regulations.⁸

In the opinion of Gemini, the Petition furthers the goals of Connecticut codified in Conn. Gen. Stat. §16-247(a) to promote the development of effective competition, facilitate the efficient development and deployment of an advanced telecommunications infrastructure and encourage the shared use of existing facilities. Gemini further submits that its request will benefit all parties, because it will promote competition to the benefit of consumers, assist Gemini in the rapid deployment of its network and services, and provide revenue to the Telco for currently unused portions of its network.⁹

⁶ See the August 25, 2003 Notice of Reopened Record and Request for Written Comments and Reply Comments (Reopen Notice).

⁷ Petition, p. 1.

⁸ *Id.*

⁹ *Id.*, p. 2.

Therefore, Gemini requests that the Department (a) declare that the HFC network formerly leased by SPV is subject to unbundling and tariffing as UNEs pursuant to Conn. Gen. Stat. § 16-247b(a); (b) conduct an expedited cost of service proceeding to determine the rates at which these UNEs will be offered pursuant to Conn. Gen. Stat. § 16-247b(b); and (c) order the Telco to provide an immediate inventory of the remaining HFC plant, including the condition of such plant and an itemized list of any portions of the plant previously disposed of by the Company.¹⁰

III. POSITIONS OF PARTIES AND INTERVENORS

A. GEMINI NETWORKS CT, INC.

Gemini argues that it is seeking unbundled access to local loops owned and controlled by the Telco because state and federal law require that the local loop be unbundled.¹¹ In the opinion of Gemini, it is irrelevant what architecture an incumbent local exchange carrier (incumbent LEC or ILEC) employs in its local network and whether the loops are constructed with ratepayer or shareholder money. Gemini states that competitive local exchange carriers (CLEC) are entitled to nondiscriminatory, unbundled access to local loops and that the Department should direct the Telco to unbundle its HFC network and move to the pricing phase of this proceeding.¹²

Gemini notes that the FCC has maintained that under any reasonable interpretation of the “necessary” and “impair” standards of §251(d)(2) of the Telcom Act, loops are subject to unbundling obligations. According to Gemini, it has merely sought nondiscriminatory unbundled access to local loops. Gemini contends that the Telco’s HFC network is nothing more than a local loop that must be unbundled.

Gemini cites to the FCC’s regulations that require ILECs to provide nondiscriminatory access to the local loop and subloop, including inside wiring owned by the incumbent LEC, on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service. Therefore, the Telco is not relieved of its unbundling obligations because of the way in which it designed its HFC network. Irrespective of whether the loop is copper, HFC, or one that has been enhanced by fiber and utilizes a remote terminal, Gemini maintains that it is still a UNE loop, as defined by the FCC, and subject to unbundling. The intention of the FCC is to ensure that the definition of a loop will apply to new as well as current technologies, and to ensure that competitors will continue to be able to access loops as a UNE as long as that access is required pursuant to §251(d)(2) of the Telcom Act. Gemini also maintains that neither self-provisioning loops nor obtaining them from third-party sources is a sufficient substitute that would justify excluding them from the unbundling obligation under §251(c)(3) of the Telcom Act.

¹⁰ *Id.*, p. 11.

¹¹ The Telco maintains that if this matter is about unbundling the local loop, it should be dismissed as moot because the Department has previously established unbundled access and pricing for those UNEs. Telco Reply Brief, p. 7.

¹² Gemini Brief, p. 1.

Gemini also notes that the Department has concurred with the FCC's ruling that local loops must be unbundled and that such unbundling is critical to encouraging market entry, as well as its requirement that the Telco provide CLECs unbundled local loops.¹³ Therefore, because the HFC network is comprised of local loops, it must be unbundled.¹⁴ Additionally, Gemini contends that the Telco bears the burden of proving that unbundling the HFC network is technically infeasible in order to avoid its unbundling obligations.¹⁵ In the opinion of Gemini, unbundling the HFC network must be deemed feasible and as a result, should form the basis for the Department's Decision in this matter.¹⁶

Gemini cites as an example, the Department's authority pursuant to 47 U.S.C. § 251(d)(3) and 47 C.F.R. § 51.317 to unbundle the HFC network. In the opinion of Gemini, the plain language of the Telcom Act and the FCC's implementing orders clearly authorize the Department to establish unbundling obligations, including unbundling the HFC network. The states' independent authority to order unbundling beyond the national list has been confirmed by the courts. Additionally, the Department has recognized its own independent state authority to rebundle network elements even after the Eighth Circuit Court of Appeals removed all requirements under the Telcom Act for an ILEC to offer such rebundled elements under federal law.¹⁷

Relative to state law, Gemini contends that the Department has ample authority to unbundle the HFC network. According to Gemini, Conn. Gen. Stat. §16-247b(a), confers on the Department a wide spectrum of powers to unbundle any portion of the Telco's network amenable to unbundling, including the HFC network. Gemini contends that the only qualification on the unbundling of the Telco's local network is that the network element be "used" to provide telecommunications service.

Gemini notes that the Department has additional, slightly more restrictive unbundling authority under Conn. Gen. Stat. §16-247b(b) because it requires the network element to be "necessary" to the provision of telecommunications services. Gemini states that there is no limiting language in Conn. Gen. Stat. §§16-247b(a) and 16-247b(b) that would prohibit the Department from unbundling any portion of the Telco's network based on the type of architecture used or the capabilities of the network

¹³ See the May 5, 1999 Decision in Docket No. 98-11-10, Application of ACI Corporation for an Advisory Ruling on The Southern New England Telephone Company's Provision of Unbundled Loops to Competitive Local Exchange Carriers, p. 11.

¹⁴ According to the Telco, the coaxial distribution facilities cannot be network elements because they are not a facility or function used in the provision of a telecommunications service as required by the Telcom Act and state statute. The Telco states that those facilities are not part of, or connected to the telecommunications network. Nor are they a loop because they are not connected to the Telco's distribution frame or its equivalent in the central office and are not connected to the telecommunications demarcation point at the end user location. Telco Reply Brief, pp. 4 and 5.

¹⁵ According to the Telco, Gemini's contention is misplaced and premature. Based on the Department's bifurcation of this proceeding, the central issue in this phase of the proceeding is whether the Telco's coaxial distribution facilities are subject to federal and state unbundling rules. Id., p. 7.

¹⁶ Gemini Brief, pp. 6-10.

¹⁷ Id., pp. 10-16. The Telco states that Gemini ignores the fact that the Supreme Court vacated all of the FCC's unbundling rules in its own Iowa Utilities decision as did the D.C. Circuit Court in United States Telecom Association, et al., v. Federal Communications Commission (USTA). According to the Telco, under the Hobbs Act, the USTA decision is the law of the land. Telco Reply Brief, p. 12.

for the provision of advanced services. Gemini argues that it is immaterial that the network was constructed as an HFC network or previously utilized to transport video signals. The only relevant inquiry is whether the network is capable of being used for telecommunications services.

Gemini also notes that Conn. Gen. Stat. §16-247f(a) obligates the Department to regulate telecommunications services in a manner that is designed to foster competition and protect the public interest. That statute also reflects the remedial nature of the whole body of law governing the provision of telecommunications services in Connecticut. Additionally, Gemini claims that the intent of the legislature is to foster competition, protect the public interest and promote the shared use of existing facilities. In the opinion of Gemini, the unbundling of the Telco's HFC network pursuant to the Conn. Gen. Stat. §16-247b(a) achieves the General Assembly's goals, especially because it involves the use of an already existing, dormant network.

Gemini asserts that state commissions have the right to order unbundling of ILEC network functions and features that go beyond the national list of UNEs, as long as they are consistent with federal law. The Connecticut statutes providing for telecommunications competition share the same goals as the Telcom Act and are consistent with that act. In the opinion of Gemini, the full objectives of the Telcom Act are designed to embrace state law by meeting local needs with federal guidance. The Connecticut Supreme Court has also recognized the Department's jurisdiction to regulate pursuant to the provisions of state law despite the presence of the Telcom Act.¹⁸

Further, Gemini disagrees with the Telco that the Department has no jurisdiction over the coaxial distribution facilities because they were not used to provide telecommunications services and, therefore, not subject to unbundling. Gemini argues that the evidence demonstrates that the HFC network was in fact used for telecommunications services and is capable of such use. According to Gemini, the HFC network need only be capable of providing one telecommunications service in any manner by which a CLEC seeks to provide such service.

Gemini contends that the purpose of the Telco's I-SNET Technology Plan (I-SNET) was to provide a full suite of voice, data and video services. The goal of which was to transform Connecticut's existing infrastructure into a robust, multifunctional core capable of supporting a variety of information, communications and entertainment applications. I-SNET was also intended to supersede the Company's existing infrastructure in that it included the total migration of the interoffice transport network to a SONET-based digital broadband platform and retirement of the existing embedded base of copper cable, circuit switching, computing and associated common and complementary assets.

While noting that SPV was granted a statewide cable television (CATV) franchise to provide video services over the I-SNET network, Gemini states that SPV leased network capacity from the Telco for purposes of deploying cable television services. SPV was also responsible for certain direct costs relating to video and 50% of the HFC

¹⁸ Gemini Brief, pp. 16-19.

network costs. Gemini maintains that the basis for this cost-sharing arrangement was the prospect that each home passed by the HFC network would subscribe to Telco telephone service and SPV cable service. Gemini also contends that the HFC network was planned and designed to serve voice customers and to provide transport for video services, in effect, to be used as the Telco's local exchange network. Therefore, Gemini disagrees with the Telco's claim that the HFC network is not capable of use for telecommunications services and suggests that the Department review the Company's telephony trial logs and make its own determination as to the capability of that network.

Gemini also argues that the Telco's focus on its use of the network is misplaced because the courts have consistently held that it is not the use of the facilities that is relevant in any inquiry, but the capability. Gemini cites to the Fourth Circuit Court of Appeals (Fourth Circuit), wherein Bell Atlantic claimed that its equipment must be in actual use, and not capable of being used in order to qualify as a network element. Gemini claims that the Fourth Circuit rejected this argument and held that such an interpretation placed undue weight on the word "used" and was contrary to the Supreme Court's acknowledgement that "network element" is broadly defined. Gemini applies the same analogy in the instant case and contends that the HFC network does not become "used in the provision of telecommunications service" only when someone starts to communicate over the network.

Additionally, Gemini cites to the FCC wherein it analyzed the issue of whether an element must be "used" in the strict sense in order to be subject to unbundling. Gemini claims that the FCC reviewed this issue in the context of dark fiber and that the Commission found that an element is subject to unbundling if it is already installed and easily called into service, similar to the unused capacity of other network elements. The FCC also found that unused transport capacity, such as that of the HFC network, is a feature, function and capability of a facility qualifying as used to provide telecommunications services.

Gemini notes that it is not required to provide the full suite of telecommunications services that the Telco is required to provide. To the extent that the HFC network is not capable of supporting some services, Gemini argues is irrelevant to any determination in this proceeding. The Telco is required to unbundle the network and allow nondiscriminatory access to provide only those services which Gemini seeks to provide. In the opinion of Gemini, the services that it seeks to provide are capable of being delivered over the HFC network, as evidenced by the Telco's service trial logs, by Gemini's provision of such services over its HFC network and by other companies offering of services over HFC networks in different parts of the country.¹⁹

Further, since the HFC network is a local loop, Gemini maintains that it is presumptively impaired by being denied access to the network. Whether the Department can unbundle additional elements beyond the national list is not subject to legitimate dispute; rather, the only question is what standard applies to the unbundling analysis. While acknowledging that the USTA decision is on appeal, Gemini argues that the Department is in no way prevented from ordering the Telco's HFC network to be unbundled. According to Gemini, the D.C. Circuit Court addressed only the FCC's

¹⁹ Id., pp. 19-25.

interpretation of the “impair” standard, and did not limit the ability of the states to utilize their authority to adopt state-specific unbundling requirements under the Telcom Act. Gemini states that the Department need only ensure that its unbundling regime fulfills the pro-competitive purposes of the Telcom Act.

Gemini cites to 47 C.F.R. § 51.317, which it contends provides for unbundling of a proprietary element if access to the element is “necessary,” and access to a non-proprietary element if lack of access to that element would “impair” the new entrant’s ability to provide the service it seeks to offer. Because the FCC has concluded that the “necessary” standard applies only to proprietary network elements, it does not apply to the HFC network because loops are, in general, not proprietary in nature. Gemini asserts that the Telco’s HFC network is no different than that currently being employed by Gemini, incumbent cable companies or other broadband service providers. Moreover, Gemini argues that the Telco cannot claim a proprietary interest in the HFC network because it has been abandoned and has no commercial value.

Relative to the impair standard, while noting that this issue has been remanded by the D.C. Circuit Court, Gemini argues that the associated impairment factors are not relevant to unbundling the HFC network and those that do, favor its unbundling. Gemini also argues that there is no dispute that competitors are unable to economically duplicate the Telco’s HFC network in those portions of Connecticut in which it exists. In promulgating the Telcom Act, it was Congress’ expectation that new competitors could use ILEC UNEs until it was practical and economically feasible for them to construct their own networks. Gemini maintains that it is impaired without unbundled access to the HFC network and such impairment reaches all customers that can be served by that network.

Gemini further maintains that material cost disadvantages favor unbundling. While noting that the D.C. Circuit Court discussed whether a cost disadvantage is “material” if it is a typical cost shared by any new entrant in an industry, Gemini suggests that the Department distinguish between typical costs a new entrant faces in any industry compared to those experienced by CLECs. Such a comparison would examine the impact of the Telco’s existing HFC network, which new entrants cannot duplicate without possessing a massive customer base. Gemini claims that the FCC recognized such sunken costs are a substantial barrier to market entry and that similar barriers to entry such as securing pole licenses are under the predominant control of the Telco. Therefore, the enormous cost disadvantages faced by CLECs are not typical of new entrants in other common industries.

Moreover, Gemini asserts that the very existence of the Telco’s HFC network represents a barrier to entry completely within the control of the Company because it is occupying the last useable space on the poles. Gemini states that in order for it to construct its own HFC network, the Telco would either have to remove its HFC network or replace the existing poles with taller poles and move the existing facilities to another pole. In either case, Gemini claims that it would incur charges for the necessary make-ready work. This is cost-prohibitive and would be a waste of deployed communications assets which is contrary to the goals of the Conn. Gen. Stat. §16-247a.

Gemini also notes that the D.C. Circuit Court has required the FCC to consider the entire competitive context in making an unbundling determination. According to Gemini, unbundling of the Telco's HFC network is consistent with the competitive goals of state statutes and the Telcom Act. In addition to encouraging Gemini's investment in its own facilities, unbundling of the HFC network would allow Gemini to build a customer base from which it could raise capital to expand its own network.

Unbundling of the HFC network is also the best way to reduce the market power that the Telco and incumbent cable companies currently exercise in the provision of broadband services. Gemini suggests that the large economies of scale in wireline and cable networks and significant costs of expansion will prevent most competitors from entering the broadband market and by requiring the Telco to unbundle its existing HFC network, competitive carriers will be permitted to enter the market.

Gemini also maintains that unbundling of the HFC network will afford CLECs the opportunity to provide broadband service to those customers that cannot be reached through the Telco's existing copper network. Unbundling of the HFC network would also afford these providers an opportunity to combine leased HFC network components with their own facilities to deliver a combination of voice and advanced services. This ability to offer these services is critical to any hope for sustained meaningful competition in voice services, especially at the residential level.

Gemini notes that neither the D.C. Circuit Court nor the Supreme Court adopted the "essential facilities doctrine" of antitrust law. In the opinion of Gemini, unbundling of the HFC network comes close to meeting the essential facilities doctrine. While disagreeing with the Telco argument that alternatives exist for Gemini's provision of services, it claims that such alternatives are not viable, concrete, nor do they permit the offering of comparable services.

Moreover, Gemini argues that use of the Telco's copper-only network merely provides Gemini with a service-delivery option that the Company is spending billions of dollars to avoid. Rather than use its own existing copper network for the provision of advanced services, Gemini notes that the Telco is deploying Project Pronto. The FCC has refused to recognize an ILEC's existing services as a substitute for access to unbundled network elements. According to Gemini, if the Telco is successful in requiring Gemini to utilize existing services and other portions of the Company's copper network, it would force Gemini to abandon its facilities-based business plan and effectively lose its ability to compete. Gemini is adamant that the Telco's existing copper network does not provide the kind of complete end-to-end connectivity that Gemini requires as part of its business plan. Nor is there any presumption under federal and state law that competitors will not construct duplicative networks. Gemini contends that its technical plan requires an HFC architecture which is faster and provides more consistent speeds for data transmission over the entire geographic reach of its network. In lieu of access to the HFC network, the Telco would impose an architecture on it that is a technologically inferior copper twisted pair. Gemini claims that the Telco cannot dictate the technology, method or parameters by which a CLEC offers service.²⁰

²⁰ See the May 5, 1999 Decision in Docket No. 98-11-10.

Gemini commits to continuing constructing additional portions of its HFC network and that the interconnection of its existing network with the Telco's (not with the Company's twisted pair copper loop network), will provide the interoperability and open networks envisioned by the Connecticut statutes. Gemini asserts that options for CLECs to replicate networks in lieu of gaining unbundled access have consistently been rejected. Gemini argues that requiring CLECs to invest in duplicative facilities would delay market entry and postpone benefits to consumers and is an economic barrier to entry that has been rejected by the FCC and the Supreme Court. Gemini also asserts that it would be cost-prohibitive to construct a duplicate network in those areas where the Telco's network currently exists and would amount to a waste of resources.²¹

Relative to the TRO, Gemini states that the FCC explicitly confirmed the Department's right to unbundle the HFC network pursuant to state law. The FCC has also reaffirmed its interpretation of 47 U.S.C. § 251(d)(3) as preserving state authority to unbundle, as long as it does not conflict with the Telcom Act. Gemini also states that the FCC also rejected the ILECs' arguments that the states are preempted from making unbundling determinations and that the Telco has previously recognized the Department's authority to unbundle pursuant to state law.²²

Additionally, Gemini claims that the FCC addressed the issue surrounding the definition of network element and whether such elements must be used vs. merely capable of being used. In the opinion of Gemini, the FCC has required that network elements that are capable of being used to provide telecommunications services must be unbundled, irrespective of whether they are used for telecommunications services.²³

Gemini also contends that the FCC has reaffirmed that a carrier is impaired when lack of access to an ILEC's network elements poses a barrier or barriers to entry, including operational and economic barriers, which are likely to make entry into a market uneconomic. According to Gemini, the TRO establishes the barriers to entry that must be considered in any impairment analysis: scale economies, sunken costs, first-mover advantages, absolute cost advantages, and barriers within the control of the incumbent LEC. In applying the impairment test, the Department must determine whether the sum of the barriers is likely to make market entry uneconomic, taking into account any countervailing advantages that a CLEC might have.

In the TRO, the FCC has also determined that actual marketplace evidence is the most persuasive and useful to any impairment analysis. Accordingly, Gemini suggests that the Department evaluate the extent to which competitors are providing retail services in the relevant market using non-incumbent LEC facilities and the deployment of intermodal technologies. Gemini also suggests that the Department is in the best position to perform the necessary "granular" analysis concerning customer classes, geography and relevant services.

²¹ Gemini Brief, pp. 25-37.

²² Gemini September 12, 2003 Comments, pp. 3 and 4.

²³ Id., pp. 4 and 5.

Gemini states that an in-depth review of those factors demonstrates that it is impaired by denial of access to the HFC network. Moreover, the TRO requires the Department to consider that Gemini is seeking access to the Telco's HFC loop facilities to provide basic voice-grade telephony services to mass market customers. Gemini claims that the FCC has concluded that facilities capable of providing such mass market voice-grade services are to be afforded the maximum unbundling, because that market is the most competitively underserved. Gemini asserts that the greatest impairment factor associated with serving the mass market is the necessary duplication of mass market loop facilities absent any guaranteed return on the investment. According to Gemini, the Telco had its own mass market captive customer base and regulated rates to fund the costs of construction of the HFC network.

Gemini further argues that the Telco has enjoyed the advantages of a first-mover as the incumbent LEC, which it extended to SPV. Gemini cites as an example the Telco not having to wait to secure pole licenses or pay for the shifting of its facilities from one utility pole to another. Finally, Gemini claims that the Telco enjoyed its existing pool of skilled labor and back office services in constructing that network. Moreover, Gemini claims that the FCC has recognized the impairment caused by Gemini and other competitors would experience in attempting to overcome the Telco's well-established brand name in order to convince reluctant mass market customers to switch their basic telephone service.

Gemini also claims that the FCC believed it was necessary to weigh other considerations that factor into the incentive to deploy advanced networks. These include the incentive to invest in next-generation architecture and the upgrading of existing loop plant, and the existence of intermodal competition. Due to the unique facts of this particular situation, Gemini notes that those "other considerations" weigh in its favor of unbundling the unique HFC network. The case for not unbundling local loop facilities rests on the resulting incentive for the ILEC to continue deployment of advanced facilities which does not exist here because the Telco has abandoned the HFC network. In order to "unleash the full potential" of the HFC network, it must be unbundled in order for Gemini to invest in the infrastructure and provide more innovative products and services to Connecticut consumers.²⁴

Gemini argues that unbundling of the HFC network is consistent with the Telcom Act and promotes the FCC's goals and spurs investment in next-generation networks for the provision of advanced services to consumers. Gemini is seeking unbundling of the HFC network for the provision of voice-grade telephony services which are "qualifying services" for which network elements must be unbundled. Nevertheless, once the HFC network is unbundled and used for the provision of qualifying services, Gemini plans to provide advanced services to Connecticut consumers, including non-qualifying services and information services. Gemini claims that this is encouraged by the FCC in order to maximize the use of facilities and not waste a network element by refusing to allow it to be put to its maximum use.²⁵

²⁴ Id., pp. 5-10.

²⁵ Id., pp. 10 and 11.

Gemini also maintains that the TRO deals extensively with the subject of unbundling of local loops focusing on the unbundling of traditional network architectures and loops including traditional copper loops, fiber-to-the home (FTTH) and hybrid copper/fiber loops. In the opinion of Gemini, the TRO does not specifically address the unbundling of the HFC loop even though the FCC recognizes HFC as a form of local loop.

Moreover, Gemini claims that the FCC sought to achieve three main goals through its triennial review. In particular, the FCC sought to: (1) implement and enforce the Telcom Act's market-opening requirements; (2) apply unbundling with a recognition of the barriers faced by competitive entrants as well as the societal costs of unbundling; and (3) establish a regulatory foundation that creates an incentive for investment in advanced telecommunications infrastructure by both ILECs and competitive providers. Gemini asserts that the unbundling of the Telco's HFC network will satisfy these goals.²⁶

Finally, Gemini states that if the FCC had addressed the HFC network in the TRO, it would likely have performed an impairment analysis similar to the one it performed for hybrid copper/fiber loops. Pursuant to this type of analysis, Gemini is entitled to the unbundling of the HFC network. Gemini contends that in reviewing whether to unbundle hybrid loops, the FCC evaluated three primary factors in an attempt to craft a balanced approach to determine the most appropriate unbundling regime for hybrid loops. These factors are the costs of unbundling, specifically focusing on whether refraining from unbundling hybrid loops would stimulate facilities-based investment and promote the deployment of advanced telecommunications infrastructure; the effect of alternatives to mandating unbundled access to hybrid loops; and the state of intermodal competition.

Gemini claims that the first factor weighs in its favor because refusing to unbundle the HFC network would not cause investment in that network by the Telco. Since the Telco has already abandoned the HFC network, the only way to stimulate investment in that network is to unbundle it and allow Gemini to upgrade the infrastructure. Gemini also claims that the third factor supports the Petition because there are no competitive providers of voice-grade telephony serving mass market customers in Connecticut.

Relative to the effect of alternatives to mandating unbundled access to the loop, Gemini asserts that these factors would vary based on whether a competitive provider was seeking access for the provision of broadband or narrowband services. Gemini contends that the TRO requires the Department to analyze the issue in this proceeding pursuant to the rules governing the provision of narrowband services, because it is seeking to provide narrowband voice-grade telephony services. In particular, the FCC has determined that for narrowband services, the Telco must provide access to portions of the hybrid loop. The Telco must also provide an entire non-packetized transmission path capable of voice-grade services between the central office and customer's premises. Consequently, for hybrid loops, competitive providers are entitled to the non-fiber feeder portion of the loop plant, the non-fiber distribution portion of the loop plant, the attached digital line carrier system and any other attached electronics used to

²⁶ Id., pp. 11-15.

provide a voice-grade transmission path between the customer's premises and the central office. In the opinion of Gemini, it is entitled to similar unbundled features, functions and capabilities.²⁷

B. THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY

The Telco states that Gemini bears the burden to prove that the Company's coaxial distribution facilities are subject to unbundling. In order to make a determination of whether specific network elements need to be unbundled, the Telco contends that the Department must find that: (1) the subject facilities are part of the Company's network; (2) the facilities are used, or dormant but of the type normally used, by the Telco (not merely capable, as Gemini contends) to provide telecommunications to Company customers; (3) it is technically feasible to unbundle the specific network elements identified by Gemini; (4) the Telco could provide nondiscriminatory access to such requested elements; (5) the requested elements are necessary to Gemini's provision of telecommunications services; and (6) Gemini would be impaired in the provision of those telecommunications services without the specific network elements. Without sufficient evidence to establish each element, the Petition must fail.²⁸

According to the Telco, the Department has no authority to compel unbundling beyond that required by the FCC and that the Department has no independent state authority to order the Company to unbundle new network elements, because the Telcom Act specifically provides only the FCC with that authority. The Telco also states that the Supreme Court has supported the Company's contention that the Telcom Act and its unbundling requirements and regulations are a federal matter beyond the jurisdiction of the individual states. In the opinion of the Telco, the fact that the FCC has not previously ordered coaxial distribution facilities be unbundled, preempts any state commission decision to require unbundling of those facilities.

The Company suggests that in the absence of express authority delegated by the FCC, the Department has no authority to grant the Petition. The FCC also lacks the power to delegate to state commissions the responsibility for determining which categories of network elements must be unbundled. The Telco also claims that there is nothing in the Telcom Act to suggest that the FCC can delegate the decision of what network elements should be made available because that act expressly directs only the FCC.

The Company contends that if the FCC were to "delegate" the unbundling authority to the states, it would undermine the national policy and unlawfully abdicate its responsibility to provide substance to the necessary and impair requirements. According to the Company, nothing within the Telcom Act or the FCC's specific pronouncements suggest that it intended to delegate that authority to the states.²⁹

²⁷ *Id.*, pp. 15-18.

²⁸ Telco Brief, pp. 6 and 7.

²⁹ Gemini notes that absent from the Telco's Brief is any discussion of the large number of FCC and judicial decisions that have interpreted Section 251(d)(3) of the Telcom Act as confirming the right of state legislatures and regulators to unbundle network elements. To date, more than 19 state public utility commissions have interpreted that statute as conferring independent unbundling rights on

Therefore, the Department does not have any explicit or implicit delegated authority to pursue additional unbundling of Telco assets.

The Telco further states that even if Gemini were correct that the Department's authority to unbundle the HFC network did not derive from the Telcom Act, state statutes require the Department to act in a manner that is consistent with federal law. Moreover, the Connecticut Supreme Court specifically found that the Department's ability to order unbundling is limited by the Telcom Act. Therefore, the Telco cannot be compelled to unbundle its facilities in a manner that is different from federal law, particularly where Gemini demands that non-telecommunications facilities be unbundled.³⁰

The Telco maintains that the Department cannot assert jurisdiction over its coaxial distribution facilities and order that they be unbundled because they are not part of the Company's network. The Telco disagrees with Gemini's reliance on Conn. Gen. Stat. §16-247b(a) as statutory authority because the Department may only unbundle a telephone company's network used to provide telecommunications. The Telco asserts that the coaxial distribution facilities are not part of the Company's network and that they were never used nor are they the type routinely used by the Telco to provide telecommunications services to the public. Because the coaxial distribution facilities are not useful for telecommunications, the Company has removed and continues to dispose of them as conditions dictate.

The Telco also asserts that it would take substantial investments in equipment and maintenance to make the existing coaxial distribution facilities a workable network and that the Department cannot compel the Company to reactivate and maintain a second network for Gemini's use.³¹ Additionally, the Telco claims that the reason it abandoned HFC was because it could not economically support two networks. The Telco asserts that Gemini ignores the fact that no operational support systems (OSS) exist to support HFC for telephony. Specifically, there is no ordering, provisioning, maintenance, repair or billing system deployed to support Gemini's request for network elements on the coaxial distribution facilities. The Telco contends that all of these costs would have to be borne by Gemini. The Telco also states that it is not aware of any vendor that has developed such an OSS. Moreover, such a request is contrary to the holding in Iowa Utilities invalidating the FCC's "superior quality" rules, which had directed incumbent LECs, upon request, to provide CLECs with access to interconnection and UNEs at levels of quality superior to the levels the ILEC provided such services to itself. Therefore, if the coaxial distribution facilities are not part of the Company's network, they cannot be subject to federal or state unbundling rules.³²

The Telco further maintains that its non-regulated facilities are not subject to the Department's jurisdiction. In the opinion of the Company, no provision in the Telcom

states. According to Gemini, the actions of those states have been upheld by the courts. Gemini Reply Brief, p. 2.

³⁰ Telco Brief, pp. 7-10.

³¹ Gemini disagrees; it has requested that it be allowed to exercise its rights pursuant to state and federal law to lease the HFC network at TSLRIC rates. Gemini Reply Brief, p. 7.

³² Telco Brief, pp. 10-12.

Act or state statutes provides the Department with jurisdiction to unbundle the Telco's non-telecommunications assets. The Company contends that when the Department granted SPV's application to relinquish its franchise, it expressly recognized the limits of its jurisdiction with respect to the Telco's assets. In citing Conn. Gen. Stat. §16-43, the Telco notes that the Department is permitted to review and approve Company initiated transactions and only if they involve property essential to its franchise or useful in the performance of its duty to the public. According to the Telco, it never used the coaxial distribution facilities to provide telecommunications services to its customers; and therefore, they cannot be considered essential to the Company's franchise.³³ Accordingly, the Department has no authority to compel the Telco to unbundle those portions of the HFC facilities that it previously recognized were not used to provide telecommunications, including those sought by Gemini.³⁴

Additionally, the Telco maintains that the coaxial distribution facilities are not subject to unbundling because they cannot now, without substantial upgrades, be used to provide telecommunications. The Telco asserts that it never equipped any of its coaxial distribution facilities with equipment to permit the provision of telecommunications services to the public. In the opinion of the Company, the Telcom Act and Connecticut law support the Telco's position that the Department may only unbundle portions of the network that are used for telecommunications purposes. The requirement in §251(c)(3) of the Telcom Act to provide network elements is limited by the definition of network element as defined in §153(29) of the Telcom Act.³⁵

The Company further claims that applicable federal and state statutes only authorize unbundling of its network and facilities used by the Telco to provide or provision telecommunications service to its customers; not, any facility that is capable of being used to provide telecommunications. According to the Telco, the FCC clarified this point in its Local Competition Order. Since the distribution facilities were not used by the Telco to provide its own telecommunications services, the Department lacks the authority to compel the Company or its shareholders to take any action.³⁶

The Telco contends that while Phase I of this proceeding focuses on the legal issue of whether the coaxial distribution facilities must be unbundled, that is not the only legal issue which must be determined. The Company asserts that even if the coaxial distribution facilities are subject to Department jurisdiction, Section 251(d)(2) of the

³³ Gemini argues that none of this is relevant because ratepayers funded the design and construction of the HFC network as an indivisible, fully integrated network to be used for both telecommunications and cable television purposes. Gemini also argues that it is not whether the HFC network is used and useful for ratemaking purposes, but whether the HFC network is capable of being used. In the opinion of Gemini, the HFC network was built to serve both functions and now cannot be restricted to only one function for the Telco's convenience. Gemini Reply Brief, p. 3.

³⁴ Gemini argues that the fact that the Department has ordered an asset removed from a regulated utility's books does not mean that the utility can never utilize that asset again nor preclude addition of that asset back onto the utility's regulated books of circumstances change. *Id.*, p. 7.

³⁵ Section 153(29) of the Telcom Act defines a network element as a facility for equipment used in the provision of telecommunication service. The Telco notes that this definition was also adopted in Conn. Gen. Stat. §16-247a(b)(7) and that Conn. Gen. Stat. §16-247b(a) only permits the Department to unbundle Telco network elements that are used to provide telecommunications services. Telco Brief, pp. 10 and 11.

³⁶ Telco Brief, pp. 13-20.

Telcom Act requires the consideration of whether the network element is necessary and whether the failure to allow access would impair Gemini's ability to provide the services it seeks to offer. The Telco claims that the FCC specifically held in 47 C.F.R. §51.317(d) that, the states must apply the standards set forth in 47 C.F.R. §51.317 as to whether the requested network element meets the necessary and impair requirements of §251(d)(2) of the Telcom Act. The Telco also states that the Connecticut Supreme Court specifically found that the Department's authority to order unbundling is limited by the requirements of §251(d)(3) of the Telcom Act. Therefore, regardless of whether federal or state law is implicated, Gemini is bound by the necessary and impair standard under either scenario.

In addition, the Company contends that Gemini deprived the Telco and the Department of the basic information necessary to conduct this inquiry. In particular, Gemini failed to demonstrate that access to the requested UNEs is necessary for it to provide telecommunications services or that it would be impaired in the provision of telecommunications services without such access. The Telco claims that the only information Gemini provided regarding its perceived impairment was its assertions about how its business plan was based on an HFC facilities' architecture and that its network cannot use the Company's copper-based network. The Telco also disagrees with Gemini's argument that if it were required to use the Company's existing network, Gemini would be forced to abandon its facilities-based business plan. According to the Telco, such an argument runs counter to current unbundling rules because they only require the Company to unbundle network elements from its existing telecommunications network. The rules do not require the Telco to modify its network or build or maintain additional facilities of a type not used or useful for the Telco's provision of its telecommunications services to meet the specific business plan of a given carrier.

Further, the Telco maintains that Gemini employs an efficiency argument in an effort to establish impairment that is irrelevant to the necessary and impair standard for several reasons. First, the Telco has existing UNEs throughout Connecticut that Gemini could purchase, obviating the need to build a duplicative network. Second, requiring the Telco to rebuild and maintain the duplicative coaxial network would simply shift the burden to the Company, rather than Gemini. Finally, Gemini was offered the option of purchasing the coaxial distribution facilities outright, which it declined.

Lastly, the Telco disagrees with the Gemini argument that more unbundling is generally good for competition and that the Company should unbundle its coaxial distribution facilities. The Telco notes that the Court of Appeals rejected this argument and an impairment analysis that turns on what the CLEC seeks to offer to the exclusion of what alternatives are already available. The Company also notes that the FCC has recently determined in the TRO that CLECs cannot meet the impair standard when seeking to unbundle overbuild broadband facilities where narrowband facilities remain available. According to the Telco, while the technologies may be different, the impairment analysis is the same for the Company's overbuild coaxial distribution facilities. Therefore, even if the coaxial distribution facilities were used by the Telco to provide telecommunications, the Company cannot be required to unbundle those facilities because there is no impairment, as long as the Telco continues to make UNEs available on the Company's copper network. The Telco concludes that Gemini could

never prove that its request to unbundle such facilities would meet the necessary and impair standard of §251(d)(2) of the Telcom Act because the Telco already provides access to its network and end users through existing UNEs.³⁷

In its written comments filed in response to the Reopened Notice, the Telco contends that the FCC has explicitly rejected the impairment argument presented by Gemini in this proceeding as the D.C. Circuit had directed in *USTA*. According to the Telco, the FCC reasoned that such an approach could give some carriers access to elements but not to others and that a carrier or business plan-specific approach would be administratively unworkable. The Telco also states that the FCC concluded that it could not order unbundling merely because certain carriers with specific business plans could be impaired. Therefore, based on the TRO, the Telco concludes that Gemini's proposed approach to unbundling is inappropriate and, as a matter of law, cannot be employed to establish impairment.³⁸

In response to Gemini's claim that this docket is about obtaining unbundled access to a local loop, the Company argues that the TRO specifically limits incumbents' local loop unbundling obligations for the deployment of broadband services to the existing copper-based legacy facilities. In particular, the FCC has required that ILECs only make available for the mass market, unbundled access to 2-wire and 4-wire analog voice-grade copper loops and subloops. In addition, the FCC found that ILECs need only provide unbundled access to local copper wire loops because they are only required to provide a complete copper-based transmission path between its central office and the customer premises. The Telco notes that while the FCC required ILECs to provide local copper loops conditioned for xDSL services, it also determined that they are no longer required to make available the HFPL as a UNE. That is, the FCC limited incumbents' unbundling obligations with respect to the deployment of broadband facilities, and the Telco's coaxial distribution facilities do not fall within the FCC's definition of a loop or subloop that is required to be unbundled.

The Telco also notes that the FCC declined to require ILECs to provide unbundled access to their hybrid loops for the provision of broadband services. The FCC also determined that ILECs were not required to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market, including any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information. Accordingly, the Telco is not required to make available unbundled access to the packetized bandwidth of hybrid loops for the deployment of broadband services because CLECs are not impaired in their ability to provide broadband services as long as the incumbent offers unbundled access to conditioned, stand-alone copper loops. Based on Gemini's request to unbundle the coaxial distribution facilities, it is the Telco's opinion that the FCC has precluded any finding of impairment. The Telco also claims that Gemini's arguments that the Telco should be required to provide unbundled access to such coaxial distribution facilities are in direct conflict with the FCC's reasoning within its TRO.

³⁷ *Id.*, pp. 20-24.

³⁸ Telco September 12, 2003 Written Comments, pp. 4 and 5.

Regarding hybrid loops, the Telco states that the FCC found that an ILEC's only unbundling obligation was to provide unbundled access to a narrowband pathway capable of voice-grade service between the central office and the customer's premises using TDM technology. The FCC also found that the ILEC, at its option, could meet this unbundling obligation by making available unbundled access to a copper homerun. In the opinion of the Telco, the FCC reasoned that this was appropriate, because there is substantial intermodal competition for broadband services. Consequently, the Telco is not required to unbundle its coaxial distribution facilities as "loop" facilities because such a requirement would directly conflict with the FCC's findings and rationale.³⁹

Moreover, the Telco maintains that the FCC further eroded the Petition by requiring that a CLEC may only access UNE(s) for the purpose of providing a qualifying service. Specifically, carriers requesting access to UNEs cannot qualify for UNEs if they only provide information services. For each UNE requested, the CLEC must provide a qualifying service on a common carrier basis. Relative to the Petition, the Telco asserts that Gemini's unbundling request must be rejected because it does not intend to use the coaxial distribution facilities to provide a qualifying service. According to the Telco, its coaxial distribution facilities do not support any qualifying telecommunications service without extensive retrofitting which is not required by the Telcom Act or the TRO, and therefore, they cannot be the subject of unbundling.⁴⁰

Further, the Telco claims that the FCC made multiple factual findings in the TRO regarding the nature and extent of competition within the broadband market that directly negate Gemini's claim that there is insufficient competition for broadband services and that the Telco, along with cable companies, exercise too much power in this market. In the opinion of the Telco, Gemini's argument directly contradicts the FCC's findings that the broadband market is not only competitive but that cable modems dominate the broadband market. The Telco states that the FCC has, with one exception, refused to unbundle the HFPL, packet switching functionalities/bandwidth and FTTH loops because the broadband market is already competitive and that less regulation and unbundling will further the Telcom Act's and FCC's goals to spur the deployment of advanced telecommunications service capabilities.

The Telco also states that the FCC has found that ILECs are only required to make available unbundled access to 2-wire and 4-wire copper analog voice-grade loops (and to condition such loops) upon request by a CLEC for the deployment of xDSL-based services, along with the ILEC's traditional TDM-based loops such as DS1s and DS3s, even where the ILEC has already deployed an overbuild hybrid network. Finally, because the market for broadband service is highly competitive, the FCC has held that carriers cannot be impaired without access to ILEC facilities, as a matter of federal law.⁴¹

Lastly, the Telco maintains that the FCC confirmed that the Department can only order unbundling of a network element that is actually part of an incumbent's network.

³⁹ Id., pp. 5-9.

⁴⁰ Id., pp. 9-11.

⁴¹ Id., pp. 11-13.

Therefore, the Department may only require the Telco to unbundle facilities in its network which constitute “network elements,” (i.e., those elements that are a part of the Telco’s network). The Telco reiterates that its remaining coaxial distribution facilities are not part of the Telco’s network and thus cannot be required to be unbundled.⁴²

C. OFFICE OF CONSUMER COUNSEL

The OCC argues that the Telco’s HFC facilities constitute UNEs and as such must be tariffed and offered on an element by element basis for lease at TSLRIC pricing. The OCC notes that I-SNET included statewide outside plant modernization utilizing HFC and switch upgrades. According to the OCC, I-SNET was described as a full service network that could provide a full suite of voice, data and video services. The OCC also claims that the stated goal of that network rebuild was to transform Connecticut’s existing infrastructure into a robust, multifunctional core capable of supporting a variety of information, communications and entertainment applications. Therefore, the OCC concludes that the HFC network was planned and designed to directly serve both telephony voice customers and to provide transport for video services.

Additionally, the OCC contends that the Department has been consistently forthright that the Telco consider itself “encouraged” if not legally bound to fully utilize this plant rather than merely storing it for an unspecified future use. The OCC cites to the SPV Relinquishment Decision,⁴³ where the Department held that should the Telco not lease the HFC network elements, “aggrieved” competitors should initiate a docket such as this to resolve the issue.

The OCC maintains that this docket requires the Department to determine, pursuant to state law, that the HFC network elements are subject to unbundling, (i.e., whether the Telco has an obligation as an ILEC to make existing facilities available to competitors in a nondiscriminatory manner). While noting the Department’s responsibility to resolve whether the HFC network is subject to unbundling pursuant to Conn. Gen. Stat. §16-247b(a), the OCC states that such a determination will initiate an inquiry governed by federal law promulgated under 47 U.S.C. § 252. According to the OCC, the FCC has adopted rules and policies designed to make UNEs available to authorized telecommunications carriers such as Gemini with extensive rules concerning good faith negotiating conduct, non-discrimination, and freedom for the lessee to combine as they see fit. Accordingly, the OCC argues that the Telco must lease UNEs at TSLRIC prices.

The OCC disagrees with the Telco that the HFC network is not subject to unbundling because it is not currently used for telecommunications services. In the opinion of the OCC, it is the capability of a network that determines whether it is subject to treatment as a UNE. Further, numerous court cases support this conclusion, highlighting the opportunity for an ILEC to avoid the legal requirement of the unbundling

⁴² *Id.*, pp. 13-15.

⁴³ Docket No. 00-08-14, Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision, Inc.’s Certificate of Public Convenience and Necessity, Decision, dated March 14, 2001 (Relinquishment Decision).

and leasing of network elements by simply taking certain equipment out of service or discontinuing a specific service. The OCC argues that the inquiry in this proceeding must determine whether the facilities can be used by a potential competitor to provide telephone service to consumers, not the current use of them by the ILEC.

The OCC also disagrees with the Telco claim that the HFC network was only used for cable television services, is not a telecommunications network and thus is not capable of being unbundled. The OCC notes that the HFC network was designed to replace the existing twisted-pair copper telecommunications network, coincidentally providing the Telco with the possibility of delivering cable television services. The ancillary use of the HFC network by the Telco's cable television subsidiary, cannot be used to prevent unbundling of telecommunications facilities.⁴⁴

Moreover, the HFC network represents a unique opportunity for sharing infrastructure to mutual advantage for the benefit of consumers. The OCC argues that for the Department to issue a ruling that portions of the Telco's HFC plant constitute UNEs, it will need to know what HFC plant currently exists, the component elements of that plant, how the plant is capable of being used, and how it constitutes a UNE. According to the OCC, the Telco has been less than forthcoming in providing that information and that the Company is in a superior position to know the current status of the HFC network in terms of inventory and capacity.

Of greater concern to the OCC however, is the Telco's claim that it has no records and no way of determining, other than a manual audit of the system, what elements of the HFC network plant remain and the condition or operability of that infrastructure. As a public service company, the Telco has an obligation to maintain adequate plant records and inventories. In the opinion of the OCC, it is incumbent upon the Department to hold the Telco responsible for its failure to adequately maintain records of existing plant. Accordingly, the OCC recommends that the Department establish a reasonable audit schedule to commence immediately, at the Telco's expense, should the Company continue to insist that it lacks precise knowledge or records detailing existing plant.⁴⁵

In comments filed in response to the Reopened Notice, the OCC states that the intent of the TRO is to promote unbundling of legacy facilities/services while achieving limited unbundling of next-generation elements to promote future investments in broadband. The result is that the Department is presented with the opportunity to unbundle a unique HFC network built and currently owned by an ILEC.

The OCC claims that the TRO compels ILECs to continue to provide unbundled access to a voice grade equivalent channel and high-capacity loops using TDM technology features, functions, and capabilities of their hybrid loops, including DS1 and DS3. This requirement forms a central feature of the FCC's overall public policy resulting from its examination of mass markets loop access and differentiated among copper loops, hybrid loops, and FTTH loops, particularly in terms of the types of services offered over these facilities. This policy provides CLECs with the opportunity to

⁴⁴ OCC Brief, pp. 2-7.

⁴⁵ Id., pp. 8-13.

continue providing both traditional narrowband services as well as high-capacity services like DS1 and DS3 circuits.

The OCC also claims that the TRO's public policies will be fulfilled by continuing the unbundling of legacy copper and hybrid loop facilities for narrowband functions, coupled with the more limited unbundling of next-generation fiber-based networks, in an attempt to encourage investment in these new networks. In addition to requiring unbundling for narrowband service with hybrid loops, unbundling of the Telco's HFC network for the narrowband uses will not deter the deployment of additional broadband in this state. The OCC states that releasing the Telco from the requirement that it unbundle its HFC network will not spur the Company to upgrade that network for broadband use. Rather, unbundling the Telco's HFC network will force further investment by the Company and others since Gemini has already demonstrated the will and ability to build an innovative network.

Further, the OCC is not convinced that intermodal competition is a worthy goal for introducing competition in the telecommunications market since thus far it has only displayed the qualities of an economic duopoly. The Petition provides an approach to advancing competition by upgrading a new platform in the architecture of telecommunications in this state.

The OCC concludes that the FCC has determined that distinguishing between "legacy" technology and "newer" technology, rather than transmission speeds, bandwidth, or some other factor, is practical because the technical characteristics of packet-switched equipment versus TDM-based equipment are well known and understood in the industry. That policy clearly dictates that the Telco's HFC network is a UNE that the OCC urges the Department order be unbundled.⁴⁶ While noting the number of legal challenges to the TRO, the OCC maintains that narrowband use of an abandoned hybrid network, remains required by law whether the TRO stands, is stayed, or is ultimately rejected by the courts.⁴⁷

The OCC also maintains that the TRO requires that, with regard to narrowband service, legacy loops consisting of all copper and also hybrid copper/fiber facilities (such as the Telco's HFC network) must continue to be provided on an unbundled basis for the provision of narrowband services. The OCC asserts that the TRO specifically requires ILECs to continue to provide unbundled access to the TDM features, functions, and capabilities of their hybrid loops. This policy provides CLECs with the opportunity to continue providing both traditional narrowband services and high-capacity services like DS1 and DS3 circuits.

Moreover, the OCC argues that the fiber elements of the HFC network have already been integrated into the trunking services the Telco provides itself and possibly leases to other providers. While noting the Telco claim that its HFC network was not used to provide telecommunications and not subject to unbundling, the OCC contends that the record demonstrates that telecommunications was the primary goal and use of the HFC network. In short, the HFC network provided narrowband (and possibly

⁴⁶ OCC September 12, 2003 Written Comments, pp. 4-8.

⁴⁷ *Id.*, p. 10.

broadband) loop service for the Telco as an integral element of the public switched telephone network and, to the extent it has survived, it is still capable of doing so. The OCC concludes that the Telco's HFC network is a UNE that must be leased to competitors on a non-discriminatory basis and subject to TSLRIC-based pricing pursuant to the TRO and existing state law.⁴⁸

The OCC also states that performing the revised impairment analysis outlined in the TRO leads to the conclusion that Gemini would be impaired by lack of access to the HFC network. Therefore, the OCC recommends that the Department require that the network be unbundled under state law, with the additional support of the provisions of the TRO. In support of that recommendation, the OCC suggests that Gemini is "impaired" when lack of access to an ILEC network element poses a barrier to entry, including operational and economic barriers, which are likely to make entry into a market uneconomic.

Additionally, the OCC states that the FCC determined that CLECs are impaired on a national basis without unbundled access to a transmission path when seeking to provide service to the mass market, although it also found as a policy matter that this impairment "at least partially diminishes with the increasing deployment of fiber." The OCC claims that the TRO defines operational and economic barriers as scale economies, sunk costs, first-mover advantages, and barriers within the control of the ILEC, specifically analyzing market-specific variations, including considerations of customer class, geography, and service.

Further, the OCC notes that the FCC has evaluated three primary factors to determine the most appropriate unbundling requirements for hybrid loops: (1) the cost of unbundling balanced against the statutory goals set forth in §706 of the Telcom Act; (2) the effect of available alternatives; and (3) the state of intermodal competition. The OCC suggests that the Department rely on an impairment analysis in this proceeding in terms of state and federal law. According to the OCC, Gemini is relying on state law to leverage a financially-beneficial access method (unbundled network elements) to utilize newer technologies or a better network architecture in order to produce additional revenue opportunities that should accrue from enhanced economies of scope. The OCC argues that Gemini has a legal right to access to the HFC network and that denial of that access constitutes impairment not permitted by law.⁴⁹

Lastly, the OCC claims that the FCC has prohibited ILECs from engineering the transmission capabilities of their loops in a way that would disrupt or degrade the local loop UNEs provided to CLECs. Specifically, any ILEC practice, policy or procedure that has the effect of disrupting or degrading access to the TDM-based features, functions, and capabilities of hybrid loops for serving the customer is prohibited under §251(c)(3) of the Telcom Act to provide unbundled access to loops on just, reasonable, and nondiscriminatory terms and conditions. The OCC states that while this provision may not have ex post facto effect which would require the rebuilding of the HFC network, it

⁴⁸ *Id.*, pp. 13-15.

⁴⁹ *Id.*, pp. 15-18.

may operate as a stay on the continued destruction of the HFC network elements remaining in the Telco's plant and subject to this proceeding.⁵⁰

D. OFFICE OF THE ATTORNEY GENERAL

The AG recommends that the Department reject the Telco's arguments that: (1) Gemini's petition is preempted under federal law; (2) the Department has no jurisdiction over the coaxial distribution facilities in Tier Three as they were not and are not used to provide telecommunications services and, therefore, are not subject to unbundling pursuant to § 251(c)(3) of the Telcom Act, Conn. Gen. Stat. § 247b(a), or any other federal or state law. The AG suggests that these arguments be rejected because the Petition is not preempted under federal law. To the contrary, the Telcom Act specifically provides that state regulatory commissions may impose access or interconnection obligations in addition to those imposed under federal law or by the FCC. According to the AG, the relevant inquiry is not whether the HFC plant was used to provide telecommunications services, but whether the plant is capable of being used for telecommunications services. Finally, the AG argues that Gemini is not required to demonstrate that it would be impaired without access to the HFC plant because it is incorrect and would undermine the broad pro-competitive policies of the Telcom Act as well as Connecticut state statutes.⁵¹

The AG states that the Telco's first argument that federal law preempts state regulatory agencies from determining what category of network elements must be unbundled is incorrect because the Supreme Court has made clear that preemption analysis must begin with the presumption that Congress did not intend to supplant state law. It is also clear that the presumption against preemption must be applied not only to decide whether Congress intended federal legislation to have preemptive effect, but also the actual scope of any preemptive effect.

The AG maintains that the Department is not preempted under federal law from exercising its regulatory authority to unbundle network elements necessary for the provision of telecommunications services. The Telcom Act specifically provides that the FCC shall not proscribe or enforce any regulation that would preclude or preempt any order of a state commission establishing access or interconnections obligations of the ILEC. Contrary to the Telco's arguments, the Telcom Act states that the FCC shall not displace or preempt the Department's authority to impose interconnection or access requirements. In the opinion of the AG, the Department's unbundling of the Telco's HFC plant does not conflict with or frustrate the FCC regulations; rather, it promotes the policies underlying those regulations. Accordingly, the Telco's arguments that the Department's authority to unbundle network elements is preempted by federal law are without merit.⁵²

Regarding the Telco's argument that the Department has no jurisdiction over the coaxial distribution facilities in Tier Three because they were not used to provide telecommunications services and not subject to unbundling, or any other federal or state

⁵⁰ Id., pp. 18 and 19.

⁵¹ AG Brief, pp. 2 and 3.

⁵² Id., pp. 3-5.

law, the AG maintains that this argument is without merit and has been rejected by the FCC as well as by trial and appellate courts throughout the country. According to the AG, the relevant inquiry is not whether the plant was used to provide telecommunications services, but whether the plant is capable of being used for telecommunications services. The AG asserts that the FCC specifically found that unused telecommunications plant was a network element subject to unbundling. Therefore, the AG recommends that the Department reject the Telco's arguments that the plant must be in use to be unbundled and tariffed. As the HFC plant is capable of being used for the provision of telecommunications services, the Telco must provide access to it in a nondiscriminatory manner.⁵³

Lastly, the AG recommends that the Department reject the Telco's claim that Gemini must make a preliminary showing that each network element is necessary for its provision of each telecommunications service and that Gemini will be impaired in its provision of those services without access to each network element. The AG contends that the Telco's argument is an incorrect statement of the law and irrelevant to the issue of whether the Company must make its plant available as UNEs to all telecommunications providers on a nondiscriminatory basis. The AG claims that the Telco is wrong that Gemini must first demonstrate that the fiber is necessary for the provision of telecommunications services before the Company provides a description of the plant sought to be unbundled. Therefore, the AG recommends that the Department find that the Telco's HFC plant is subject to unbundling and tariffing as an UNE pursuant to Conn. Gen. Stat. § 16-247b(a) and order the Company to unbundle its HFC network and move to the pricing phase of this proceeding.⁵⁴

IV. DEPARTMENT ANALYSIS

A. INTRODUCTION

Gemini has requested the Department issue a Declaratory Ruling finding that certain HFC facilities owned by the Telco constitute UNEs and as such, must be tariffed and offered on an element by element basis at TSLRIC pricing. As indicated above, this proceeding has been bifurcated to address the legal issues. However, before addressing those issues, a discussion of the Telco's I-SNET technology plan, which included the statewide modernization of its outside plant utilizing the HFC technology and switch upgrades, is appropriate.

B. HFC NETWORK HISTORY

On December 29, 1994, as revised on April 11, 1995, the Telco filed its I-SNET Technology Plan with the Department. The intent of I-SNET was to be a full service network that could provide a full suite of voice, data and video services.⁵⁵ The goal of I-

⁵³ *Id.*, pp. 5-7.

⁵⁴ *Id.*, pp. 7 and 8.

⁵⁵ In Docket No. 99-04-02, Application of SNET Personal Vision, Inc. to Modify its Franchise Agreement, the Southern New England Telecommunications Corporation (SNET) testified that it anticipated significant opportunities for efficiencies in terms of operation, maintenance and ability to quickly provide telecommunications services to customers. SNET also testified that I-SNET was "proved-in"

SNET was to transform Connecticut's existing infrastructure into a robust, multifunctional core capable of supporting a variety of information, communications and entertainment applications. I-SNET was also intended to supersede the Company's existing infrastructure and address the state's emerging, broadband, communications requirements. In support of I-SNET, the Company stated that the existing telecommunications infrastructure was a contemporary one, capable of providing high quality voice-oriented communications and a variety of existing data communications applications. However, as customer requirements and communications technologies evolved to support other modes of communication, and as industry changes introduced competition and imposed new open-access requirements, it was anticipated that new and varied communications requirements would be imposed on the infrastructure. These functional requirements were addressed by I-SNET and were expected to range from narrowband (for voice and "low-speed" data applications) to broadband (for video and "high-speed" data applications). According to the Company, I-SNET was necessary to meet these requirements and to support those communications services.⁵⁶

As part of I-SNET, the Company was to deploy over 200,000 plant miles of broadband transmission media, comprised of optical fiber and coaxial cable. Statewide deployment of Synchronous Optical Network (SONET) interoffice transport systems, digital switching, Signaling System Number 7 (SS7), Advanced Intelligent Network (AIN) and Integrated Services Digital Network (ISDN) capabilities were also to occur by 1999 that would complement the Company's fiber and coaxial installation. The Company expected that the complete timeframe for this infrastructure deployment would span a time period beginning in 1994 and end in 2009.⁵⁷

Additionally, as part of that plan, the Company's analog and digital switches were to form the backbone of its switching network.⁵⁸ During the 1994–1999 time frame, electronic aggregate was to evolve into a streamlined, all digital platform complemented by ISDN-based digital access, SS7 signaling and AIN call control. Further, broadband infrastructure deployment was to begin with: 1) the total migration of the interoffice transport network to a SONET-based digital broadband platform; 2) initial broadband switch deployment (for data and video applications) with AIN-like call control capability; and 3) full deployment of the broadband operations management platform. These activities were also to result in the retirement of: 1) the embedded base of analog switches and asynchronous interoffice transmission systems; 2) significant portions of the embedded base of the digital switching system; 3) asynchronous loop transmission systems; 4) copper loop plant; and 5) an associated variety of common and complementary systems and subsystems.

based on telephony cost savings alone and that potential video revenues were incremental revenues to the cost savings the Company expected to realize. According to SNET, when conversion to the HFC network was complete, the Company expected that network operating costs would be significantly less per access line than with the twisted copper pair. August 25, 1999 Decision, Docket No. 99-04-02, p. 4.

⁵⁶ November 21, 1995 Decision, Docket No. 94-10-03, DPUC Investigation into the Southern New England Telephone Company's Intrastate Depreciation (Depreciation Proceeding), Table B, p. B.

⁵⁷ Id.

⁵⁸ The Telco's modernization of switches from analog to digital was completed in the fourth quarter of 2001. December 18, 2002 Decision in Docket No. 02-01-19, DPUC Annual Report to the General Assembly on the Status of Telecommunications in Connecticut, p. 15.

Moreover, during the 2000-2004 timeframe, broadband modernization was to continue resulting in expanded broadband access to 84% of Connecticut's access lines. The Company also intended to introduce multimedia (voice, data, video), optimized broadband switching systems in the network, that would leverage and further consolidate the Company's switching consolidation efforts that began in the 1994-1999 timeframe.⁵⁹

Lastly, during the third and final stage, the 2005-2009 timeframe, it was anticipated that the I-SNET deployment would be completed. The Company expected its telecommunications infrastructure to transform to an end-to-end broadband network, capable of providing full service network capabilities to all Connecticut subscribers. The Company also anticipated at the completion of the I-SNET deployment period, that the existing embedded base of copper cable, circuit, switching, computing and associated common and complementary assets would be replaced and retired. During the I-SNET deployment timeframe, the Company's network infrastructure was also expected to evolve from the current 125 switching locations that was comprised of 145 switches to 41 switching locations containing approximately 50 switches. According to the Company, this consolidation would facilitate evolution to a unified, broadband, multi-media network based on SONET transport and Asynchronous Transfer Mode (ATM) switching as defined by the broadband-ISDN architecture.⁶⁰

In the Depreciation Proceeding, the Department determined that it was in the public interest that the Telco be afforded the opportunity to provide business and residential customers the benefits of new telecommunications technologies.⁶¹ The Department also determined that the Company should be provided the necessary assurances that its commitments introduce, where practical, the latest technology available.⁶² Accordingly, the Department permitted the Company to include for purposes of depreciation, an allowance for the plant that would be retired due to the I-SNET deployment. This allowance would subsequently be recovered from the Telco's customers.⁶³

Furthermore, as part of the Company's approved Alternative Regulation Plan (Alt Reg Plan), the Telco proposed quality of service standards that were based on the Company's expected service performance and its deployment of I-SNET.⁶⁴ In the March 13, 1996 Decision in Docket No. 95-03-01, the Department determined that the Telco would, through the implementation of I-SNET, improve productivity and control costs while maintaining the quality of service necessary to retain existing customers and attract new ones. Also during Docket No. 95-03-01, the Telco testified that in the long term, the deployment of HFC facilities would provide various features that could detect and address service degradation before customers experience service problems. The

⁵⁹ November 21, 1995 Decision, Docket No. 94-10-03, Table B, p. C.

⁶⁰ Id.

⁶¹ November 21, 1995 Decision, Docket No. 94-10-03, p. 19.

⁶² Id.

⁶³ Id., pp. 19 and 20.

⁶⁴ See the March 13, 1996 Decision in Docket No. 95-03-01, Application of the Southern New England Telephone Company for Financial Review and Proposed Framework for Alternative Regulation.

Telco claimed that these HFC facilities would have network surveillance and built-in diagnostic capabilities which could detect points of failure and allow the Company to take the necessary corrective action. Those facilities also possessed the ability to automatically schedule preventive maintenance to ensure service dependability. Consequently, the Telco expected to improve its service quality every year during the deployment of the I-SNET and the HFC network. Accordingly, as part of its approved Alt Reg Plan, the Department employed the Company's service standard objectives in place at that time as a starting point, and over the course of the Alt Reg Plan, increased the minimum objectives based in part on the Telco's expected improvement in service quality resulting from its infrastructure modernization plan.⁶⁵

However, in November 1996, Lucent, the major manufacturer and supplier of HFC components, announced that it would no longer be an HFC vendor. Beginning in 1996 many large telecommunications companies began to retreat from HFC leading to Lucent's abandonment of the HFC technology. The Telco undertook its own HFC review and ultimately decided to continue to deploy the HFC technology. Additionally, in February 1997, the National Electric Safety Code standards subcommittee denied the Company's request for a modification to allow placement of an independent power supply source as part of the fiber strand in the communications gain on telephone poles. The Telco claimed in Docket No. 99-04-02 that it had not found a cost-effective means of providing an independent power supply source and had used commercial power with battery back-up and portable generators. The Telco also stated that while such an arrangement was an acceptable approach for a very small number of customers, it could not be employed for broadscale use.⁶⁶

At about the same time, many of the companies that had begun to deploy the HFC technology started to report that provision of telephone service over an HFC network was not technologically and economically viable. Beginning in 1997, telecommunications companies such as Pacific Bell (now a part of SBC Communications Corporation, Inc. (SBC)), NYNEX, Bell Atlantic, (currently a part of the Verizon Corporation) and Time Warner began to retreat from, and subsequently reject, HFC as a full service network solution. Presently, no incumbent local telephone company, including the Telco, offers both telephony and CATV services over an HFC network.⁶⁷

While no incumbent local telephone company, including the Telco, appears to offer telecommunications services over an HFC network, the clear purpose of I-SNET was to replace the Company's existing infrastructure so that it could provide voice, data and video services to its customers. If successfully deployed, I-SNET and the HFC network would have afforded the Company the ability to offer a full set of telecommunications services effectively and efficiently. The Department finds that in its I-SNET Plan, the Company did not identify or differentiate the facilities that would be used for telecommunications services (i.e., voice and data) and those that would be

⁶⁵ Id., pp. 46 and 47.

⁶⁶ August 25, 1999 Decision, Docket No. 99-04-02, p. 5.

⁶⁷ Id.

used to support the offering of CATV services.⁶⁸ Rather, in accepting the I-SNET plan for purposes of a depreciation allowance and alternative regulation, the Department was led to believe that one network would support a full service offering package.⁶⁹

Therefore, the Department concludes that I-SNET and the HFC network was to be used to support a host of telecommunications (including video) services. Based on the intended use of the HFC network, the Telco sought and was granted favorable regulatory treatment relative to depreciation and alternative regulation. The Department believes that had the HFC network been fully constructed in the manner as envisioned by the Telco in 1994, the Company would be well on its way in offering voice, data and video services over that network.⁷⁰ Additionally, it is because of the favorable treatment afforded the Telco, most notably in the Depreciation Proceeding and in Docket No. 95-03-01, that the Department will consider the Petition in light of the SPV Disposition Plan approved in Docket No. 00-08-14 and the recovery of the costs and expenses associated with that network's assets by the Company's shareholders.

C. FEDERAL AND STATE UNBUNDLING REQUIREMENTS

As a result of the Telcom Act and Connecticut Public Acts 94-83, An Act Implementing the Recommendations of the Telecommunications Task Force and 99-122, An Act Concerning Competition in the Telecommunications Industry,⁷¹ certain responsibilities and obligations have been imposed on the Telco in order to promote telecommunications competition. The following analysis discusses in part, those obligations.

1. Telcom Act

Section 251(c)(2) of the Telcom Act imposes on ILECs:

- . . . the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—
- (A) for the transmission and routing of telephone exchange service and exchange access;
 - (B) at any technically feasible point within the carrier's network;
 - (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
 - (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and

⁶⁸ See for example, the November 21, 1995 Decision, Docket No. 94-10-03, Table B, p. D, wherein the Company provided the milestones for its network modernization.

⁶⁹ Table B, p. C.

⁷⁰ *Id.*, p. D.

⁷¹ Codified at Conn. Gen. Stat. §§16-247a-16-247r (Connecticut Statutes).

conditions of the agreement and the requirements of this section and section 252.

In addition, §251(c)(3) of the Telcom Act requires ILECs to provide:

. . . to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

Further, §251(d)(2) of the Telcom Act required the FCC when determining what network elements should be unbundled to consider whether:

- (A) access to such network elements as are proprietary in nature is necessary; and
- (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

The Telcom Act requires the ILECs to make available to CLECs, access to UNEs at reasonable, nondiscriminatory terms and conditions. This means ILECs must provide carriers with the functionality of a particular element, separate from the functionality of other elements, and must charge a separate fee for each element.⁷² The FCC concluded that access to an UNE refers to the means by which requesting carriers obtain an element's functionality in order to provide a telecommunications service. The FCC also indicated that just as §251(c)(2) of the Telcom Act requires interconnection at any technically feasible point, §251(c)(3) of the Telcom Act also requires access be provided at any technically feasible point. Therefore, pursuant to the terms of §§251(c)(2), 251(c)(3) and 251(c)(6) of the Telcom Act, an ILEC's duty to provide access constitutes a duty to provide a connection to a network element independent of any duty imposed by §251(c)(2) of the Telcom Act and that such access must be provided under the rates, terms, and conditions that apply to unbundled elements.⁷³

The FCC also addressed the “necessary and impair” standards outlined in §251(d) of the Telcom Act.⁷⁴ Specifically, the Commission recognized that §251(d)(2) of the Telcom Act provided the FCC with the ability to not require ILECs to provide access

⁷² CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and CC Docket No. 95-185, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order (FRO), August 8, 1996, ¶265.

⁷³ Id., ¶269.

⁷⁴ Id., ¶279.

to UNEs if for example, access to that particular element was not necessary.⁷⁵ In the opinion of the FCC, “necessary” meant that an element was a prerequisite for competition.⁷⁶ The FCC also recognized that §251(d)(2)(A) of the Telcom Act permitted the Commission and the states to require the unbundling of additional elements (beyond those identified by the FCC) unless the ILEC could prove to the state commission that the element was proprietary, or contained proprietary information that would be revealed if the element was provided on an unbundled basis; and a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network.⁷⁷ The FCC rejected the notion that ILECs need not provide proprietary elements if the requesting carriers could obtain the proprietary element from a source other than the incumbent. According to the FCC, requiring new entrants to unnecessarily duplicate parts of the ILEC's network would generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the Telcom Act.⁷⁸

The FCC further refined its definition of “necessary” within the meaning of §251(d)(2)(A) of the Telcom Act, by considering the availability of alternative elements outside of the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, preclude a requesting carrier from providing the services it seeks to offer. The FCC also concluded that this “necessary” standard differed from the “impair” standard because a “necessary” element would, if withheld, prevent a carrier from offering service, while an element subject to the “impair” standard would, if withheld, merely limit a carrier's ability to provide the services it seeks to offer.⁷⁹

Relative to the impair standard, the FCC believed that an entrant's ability to offer a telecommunications service was diminished in value if the quality of the entrant's service, absent access to the requested element, declined and/or the cost of providing

⁷⁵ Id.

⁷⁶ Id., ¶282.

⁷⁷ Id., ¶283.

⁷⁸ Id.

⁷⁹ FCC Docket No. 99-238, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Rel. November 5, 1999 (UNE Remand Order), ¶¶44 and 46. The UNE Remand Order was issued in response to the US Supreme Court's January 1999 decision that directed the FCC to reevaluate the unbundling obligations of §251 of the Telcom Act. According to the FCC, the Supreme Court's decision removed many of the uncertainties surrounding the requirements of §251 of the Telcom Act by upholding the majority of the Commission's rules implementing that section of the act, including its jurisdiction to implement §§251 and 252, the FCC's definitions of network elements, and its rule requiring ILECs to offer combinations of unbundled network elements that are already combined. The Supreme Court also directed the FCC to revise the standards under which the unbundling obligations of §251(c)(3) of the Telcom Act are determined. Specifically, the Supreme Court required the FCC to give some substance to the “necessary” and “impair” standards in §251(d)(2) of the Telcom Act, and to develop a limiting standard that was related to the goals of that act. In addition, as the FCC developed the “necessary” and “impair” standards, the Supreme Court required the Commission to consider the availability of alternative network elements outside the incumbent's network. Id., ¶1.

the service increased. Accordingly, the FCC interpreted this standard to require the Commission and the states, when evaluating unbundling requirements beyond those identified by the FCC, to consider whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the ILEC's network.⁸⁰ The FCC also declined to adopt the impairment standard advanced by most Bell Operating Companies (BOC) wherein they must provide UNEs only when the failure to do so would prevent a carrier from offering a service. Additionally, the FCC rejected the related interpretations that carriers are not impaired if they can obtain elements from another source, or if they can provide the proposed service by purchasing the service at wholesale rates from a LEC.⁸¹

In its UNE Remand Order, the FCC concluded that the failure to provide access to a network element would impair the ability of a requesting carrier to provide the services it seeks to offer if, taking into consideration the availability of alternative elements outside the ILEC's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminished a requesting carrier's ability to provide the services it sought to offer. The FCC also found that a materiality component requires that there be substantive differences between the alternative outside of the incumbent LEC's network and its network element that, collectively, "impair" a CLEC's ability to provide service within the meaning of §251(d)(2) of the Telcom Act. Consequently, the FCC concluded that where a competing LEC's "ability to offer a telecommunications service in a competitive manner is materially diminished in value without access to that element," the competitor's ability to provide its desired services would be impaired.⁸²

Finally, the Department notes that §251(d)(3) of the Telcom Act provides the states with independent authority to require unbundling.⁸³ Specifically, §251(d)(3) of the Telcom Act states:

PRESERVATION OF STATE ACCESS REGULATIONS- In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

- (A) establishes access and interconnection obligations of local exchange carriers;
- (B) is consistent with the requirements of this section;

⁸⁰ FRO, ¶285.

⁸¹ *Id.*, ¶286.

⁸² UNE Remand Order, ¶51.

⁸³ The Department is perplexed by the Company's argument in this proceeding that "the Department has no independent state authority to order the Telco to unbundle new network elements." Telco Brief, pp. 7 and 8. The Department questions this statement in light of a filing made in US District Court, wherein the Telco argued that "state commissions such as the Department are permitted under federal law to expand the FCC's list of network elements that must be unbundled." See the July 3, 2001 Complaint for Declaratory and Injunctive Relief, Civil Action No. 301CV01261, The Southern New England Telephone Company, v. Donald W. Downes, et al in their official capacities as Commissioners of the Department of Public Utility Control, p. 6.

and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

This was reaffirmed by the FCC when it stated that §251(d)(3) of the Telcom Act grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of §251 of the Telcom Act and the national policy framework instituted in the UNE Remand Order.⁸⁴

2. Triennial Review Order

The FCC has reaffirmed its definition of a network element as requiring ILECs to make available to requesting carriers network elements that are capable of being used in the provision of a telecommunications service.⁸⁵ Citing to 47 U.S.C. §153(29),⁸⁶ the FCC states that a network element includes features, functions and capabilities that are provided by means of such facility or equipment.⁸⁷ The FCC also states that:

. . . the definition of a network element is ambiguous as to whether the facility must be *actually used by the incumbent LEC* in the provision of a telecommunications service or must be *capable of being used* by a requesting carrier in the provision of a telecommunications service regardless of whether the incumbent LEC is actually using the network element to provide a telecommunications service. We find that, taken together, the relevant statutory provisions and the purpose of the 1996 Act support requiring incumbent LECs to provide access to network elements to the extent those elements are capable of being used by the requesting carrier in the provision of a telecommunications service.⁸⁸

The FCC further states when defining a network element, that to interpret the definition of a “network element” so narrowly as to mean only facilities and equipment used by the ILEC, in the provision of a telecommunications service would be at odds with §251(d)(2) of the Telcom Act and the act’s pro-competitive goals. Additionally, providing requesting carriers with access only to those facilities and equipment actually used by the ILEC would lead to such unreasonable results. Finally, the FCC notes that an alternative reading of that statute would allow ILECs to prevent competitors from making new and innovative uses of network elements simply because the ILEC has not yet offered a given service to consumers. The FCC concludes that such a result would

⁸⁴ UNE Remand Order, ¶154.

⁸⁵ TRO, ¶58.

⁸⁶ 47 U.S.C. §153(29) defines a network element as “a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.”

⁸⁷ *Id.*

⁸⁸ TRO, ¶59.

stifle competitors' ability to innovate and could hinder deployment of telecommunications services.⁸⁹

Relative to "qualifying services," the FCC has determined that in order to gain access to UNEs, carriers must provide qualifying services using the UNEs to which they seek access.⁹⁰ The FCC defines "qualifying" as those telecommunications services offered by requesting carriers in competition with those that have been traditionally the exclusive or primary domain of the ILECs. Those services include local exchange service, such as POTS and access services, such as xDSL and high capacity circuits.⁹¹

Moreover, the FCC finds that once a requesting carrier has obtained access to a UNE in order to provide qualifying service, the carrier may use that UNE to provide any additional services, including non-qualifying telecommunications and information services.⁹² The FCC concludes that allowing requesting carriers to use UNEs to provide multiple services on the condition that they are also used to provide qualifying services will permit carriers to create a package of local, long distance, international, information, and other services tailored to the customer.⁹³

The FCC again addressed the Necessary and Impair Standard. Specifically, the FCC determined that while the Telcom Act does not offer a definition of "impair," there are a number of possible definitions available for determining when impairment exists. The FCC cites as an example, *barriers to entry*, to examine whether competitors are prevented from entering a particular market.⁹⁴ According to the FCC, depending on the circumstances, barriers to entry can come from a variety of factors such as sunken costs, scale economies, scope economies, absolute cost advantages, capital requirements, first-mover advantages, strategic behavior by the incumbent, product differentiation, long-term contracts, and network externalities.⁹⁵

3. Connecticut Statutes

In addition to the authority granted in the Telcom Act, the Department possesses the authority to require the unbundling of the Telco's HFC network pursuant to Conn. Gen. Stat. §16-247b(a). That statute provides in part, that:

On petition or its own motion, the department shall initiate a proceeding to unbundle the noncompetitive and emerging competitive functions of a telecommunications company's local telecommunications network that are used to provide telecommunications services and which the department determines, after notice and hearing, are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combinations.

⁸⁹ Id., ¶60.

⁹⁰ Id., ¶ 135.

⁹¹ Id.

⁹² Id., ¶143.

⁹³ Id., ¶146.

⁹⁴ Id., ¶74.

⁹⁵ Id., ¶75.

In addition, Conn. Gen. Stat. §16-247b(b) requires in part that:

Each telephone company shall provide reasonable nondiscriminatory access and pricing to all telecommunications services, functions and unbundled network elements and any combination thereof necessary to provide telecommunications services to customers. . . .The rates for interconnection and unbundled network elements and any combination thereof shall be based on their respective forward looking long-run incremental costs, and shall be consistent with the provisions of 47 USC 252(d).

Conn. Gen. Stat. §16-247b complements the Telcom Act and FCC orders by separately providing the Department with the authority to require the unbundling of network elements. Therefore, the Department is not limited, nor do the Connecticut Statutes restrict the Department from requiring the unbundling of network elements based on the various telecommunications services offered by the ILEC.

4. Conclusion

a. Statutory Authority

The Telcom Act, Connecticut Statutes, FCC orders (specifically, the TRO) and court decisions provide the terms and conditions under which the Telco must provide access to UNEs or unbundle its telecommunications network to its competitors. The FCC has further refined those terms and conditions and developed a UNE list that identifies the minimum number of unbundled network elements that must be offered by the Telco to its competitors. The Telcom Act also provides the states with the independent authority to require unbundling beyond the list of UNEs approved by the FCC. The Connecticut Statutes have also provided the Department with the authority to require the unbundling of ILEC network elements.⁹⁶ In the opinion of the Department, unbundling of the Telco's HFC network is consistent with the Telcom Act because it accomplishes what that act intended to do, afford Gemini access to UNEs that it does not already possess in order to provide service offerings in direct competition with the incumbent LEC (i.e., the Telco).

This authority was recently reaffirmed by the FCC in the TRO.⁹⁷ In particular, the FCC noted that §251(d)(3) of the Telcom Act preserves the states' authority to establish

⁹⁶ While Conn. Gen. Stat. §16-247b(a) requires that network elements that are necessary for the provision of telecommunications services, as discussed below, Gemini will be at a definite competitive disadvantage if access to the Telco's HFC network is denied. Beginning with the differences in network performance afforded to Gemini through the use of HFC facilities versus that provided over copper, Gemini would be unable to meet its business plan or offering of end to end communications to its customers. Additionally, the interconnection of Gemini's existing HFC Network is only possible with the Telco's existing HFC Network and not with the Company's twisted pair copper loop network, thus providing the kind of interoperability and open networks envisioned by the Connecticut statutes. Gemini Response to Interrogatory TELCO-4.

⁹⁷ TRO, ¶191.

unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Telcom Act and its purposes or the Commission's implementing regulations. Conn. Gen. Stat. §16-247b is consistent with that act. The FCC also noted that many states have exercised their authority under state law to add network elements to the national list.⁹⁸ More importantly however was the FCC's disagreement with incumbent LECs (specifically, SBC, the Telco's parent) who argued that the states are preempted from regulating in this area as a matter of law. According to the FCC, if Congress had intended to preempt the field, Congress would not have included §251(d)(3) in the Telcom Act.⁹⁹

b. Used and Useful vs. Capable of Being Used

The Telco argument proffered in this proceeding against permitting the unbundling of the HFC network (because it was not used in the provision of telecommunications service) has been addressed in the Appellate Court and in the UNE Remand Order¹⁰⁰ and the TRO. For example, this argument was rejected by the United States Court of Appeals for the Fourth Circuit. See AT&T Communications of Va., Inc. v. Bell Atlantic – Va., Inc., 197 F.3d 663, 672 (4th Cir. 1999). In that proceeding, Bell Atlantic claimed that its equipment must be in actual use, and not merely capable of being used in order to qualify as a network element. In its opinion, the Fourth Circuit rejected that argument and held that such an interpretation placed undue weight on the word "used" and was contrary to the Supreme Court's acknowledgement that "network element" was broadly defined.

More importantly however was the FCC's determination that an element is subject to unbundling if it is already installed and called into service. Similar to the Fourth Circuit Court's finding noted above, the FCC, when addressing when a potential competitor is impaired without access to dedicated and shared transport, stated that:

⁹⁸ Id.

⁹⁹ Id., ¶192 and fn. 609.

¹⁰⁰ The Telco and Gemini acknowledge that portions of the UNE Remand Order have been remanded to the FCC by the D.C. Circuit Court. (See USTA wherein the D.C. Circuit Court directed the FCC to re-examine certain issues pertaining to UNEs and one issue relating specifically to line sharing). The Telco also claims that the USTA order vacated the FCC's unbundling standards and without new standards, it would be difficult for the Department to justify that Gemini is impaired by its failure to gain access to the Company's coaxial distribution facilities. (Telco Reply Brief, p. 20). The Department disagrees with that conclusion. In USTA, the D.C. Circuit was very deliberate in vacating only that portion of the FCC's order pertaining to line sharing and not the necessary standard provided for in the UNE Remand Order.

We reject incumbent LECs' arguments that because dark fiber is transport that is not currently "used" in the provision of a telecommunications service, within the meaning of section 153(29), it does not meet the statutory definition of a network element or the definition of interoffice transport. Rather, we agree with the Illinois Commission that the term "used in the provision of telecommunications service" in section 153(29) refers to network facilities or equipment that is "customarily employed for the purpose" of providing a telecommunications service. Although particular dark fiber facilities may not be "lit" they constitute network facilities dedicated for use in the provision of telecommunications service, as contemplated by the Act. Indeed, most other network elements have surplus capacity or can be upgraded to provide additional capacity and therefore are not always "currently used" as the term is interpreted by incumbent LECs. For example, switches, loops, and other network elements each may have spare, unused capacity, yet each meets the definition of a network element.

We acknowledge that it would be problematic if some facilities that the incumbent LEC customarily uses to provide service were deemed to constitute network elements (e.g., unused copper wire stored in a spool in a warehouse). Defining such facilities as network elements would read the "used in the provision" language of section 153(29) too broadly. Dark fiber, however, is distinguishable from this situation in that it is physically connected to the incumbent's network and is easily called into service. Thus, as indicated above, we conclude that dark fiber falls within the statutory definition of a network element.¹⁰¹

The FCC's recent clarification of network elements relative to "used vs. capable of being used" analysis is instructive to this proceeding as well.¹⁰² Specifically, the FCC requirement that unbundled access to network elements that are "capable of being used" be provided to competitors. In the instant case, the Telco HFC network has already been deployed and could be placed into service by Gemini. Gemini has committed, most recently in its September 26, 2003 Reply Comments, to providing voice-grade narrowband services, including POTS, over the HFC network.¹⁰³ In light of the TRO, the Department finds that the HFC network while actually not being used to provide telecommunications services, was constructed in part and intended by the Company to provide a full complement of voice data and video services. In the opinion of the Department, the capability existed for provision of those services and as such, the HFC network should be unbundled. The Department also finds that based on 47 U.S.C. 153(29) the HFC network meets the definition of a "network element," and therefore it must be unbundled. Accordingly, the Department is not persuaded by the Company's

¹⁰¹ UNE Remand Order, ¶¶327 and 328.

¹⁰² TRO, ¶¶59 and 60.

¹⁰³ See also the September 28, 2001 Decision in Docket No. 01-06-22, wherein Gemini was authorized by the Department to offer retail facilities-based and resold local exchange telecommunications services throughout Connecticut. Specifically, Gemini has been permitted to offer local exchange flat rate, measured rate, operator access, residential custom and class features, basic business exchange services, intrastate toll, directory assistance, residential ancillary and operator services to business and residential customers throughout Connecticut. Docket No. 01-06-22 Decision, pp. 1 and 2.

argument that it is not required to make available unbundled access to these facilities because Gemini will only be offering broadband services. Gemini has committed to offering the FCC's qualifying telecommunications services over that network, and in accordance with the TRO, other services (e.g., broadband) may also be offered.

The FCC has also considered the effect of alternatives to mandating unbundled access to the hybrid loops of ILECs. Specifically, whether unbundled access to subloops, spare copper loops, and the nonpacketized portion of ILEC hybrid loops, as well as remote terminal collocation, offer suitable alternatives to an intrusive unbundling approach.¹⁰⁴ Relative to the Petition, Gemini has requested unbundled access to the coaxial portion of the loop and the electronics related to that plant.¹⁰⁵ The Telco HFC network and hybrid facilities differ from those addressed by the FCC in the TRO. In comparing the Petition for access to HFC network components to those considered by the FCC in the TRO, they appear to be analogous. That is, the hybrid loop components that the FCC has required be unbundled are equivalent to those in the HFC network that Gemini has sought access to in the Petition in support of its provision of narrowband services. Therefore, these components should be unbundled.

The Telco also argues that even if the Department had the additional authority to unbundle the Company's coaxial distribution facilities, such action would be inconsistent with or conflict with the TRO.¹⁰⁶ According to the Telco, the FCC conclusion regarding hybrid loops and an ILEC's unbundling obligations for a CLEC's deployment of broadband service supports the Telco's position that it cannot be obligated to unbundle those coaxial facilities.¹⁰⁷ The Department disagrees. The Telco's HFC network is unique. Additionally, while the TRO did not specifically address the network facilities that are the subject of this proceeding, the FCC crafted this order in part, to reflect the intent of the Congress and the Telcom Act. In particular, the recognition of market barriers to entry faced by new entrants as well as the societal costs of unbundling. Indeed, the FCC correctly established a regulatory foundation that seeks to ensure that investment in telecommunications infrastructure will generate substantial, long term benefit for all consumers.¹⁰⁸

Connecticut has before it a competitive service provider that is willing to invest in the state's telecommunications infrastructure, a portion of which has been abandoned by the Telco. Gemini has not only committed to investing in that network, but has also committed to offering a full panoply of telecommunications services to consumers. In the opinion of the Department, access to the HFC network by Gemini will meet the Telcom Act and FCC pro-competitive goals (as well as those outlined in Conn. Gen. Stat. §16-247a) by providing for increased competition in the Connecticut local exchange service market. Unbundling of the HFC network will encourage the deployment of advanced facilities by Gemini as evidenced by its commitment to invest in that network.

¹⁰⁴ TRO, ¶199.

¹⁰⁵ Gemini September 12, 2003 Written Comments, pp. 17 and 18.

¹⁰⁶ Telco September 26, 2003 Written Comments, pp. 22-26.

¹⁰⁷ *Id.*, p. 23.

¹⁰⁸ TRO, ¶5.

Regarding the used and useful requirements of the Telcom Act and Connecticut Statutes, federal and state law require that Gemini be afforded access to the Telco's network and UNEs. Although the HFC network did not develop in the manner envisioned by the Company, it was intended to provide voice services, and therefore, capable of providing telecommunications services. If deployment of the I-SNET network had occurred as intended, the Company would have been well on its way to offering telecommunications services over the HFC network. The Telco's deployment of that network began prior to implementation of the Telcom Act and subsequent FCC orders and Connecticut Statutes, and as such, the Company would most likely have been required to permit competitors unbundled access to that network if it were fully functional today.

The Telco argues that the coaxial cable facilities at issue in this proceeding are not a network element that the Company is obligated to unbundle.¹⁰⁹ Citing the TRO, the Telco maintains that these facilities do not constitute a network element because they are neither a part of the Company's network nor capable of being used to provide a telecommunications service without significant modifications that go beyond those the FCC has required ILECs to make in the provision of UNEs.¹¹⁰ The Telco also argues that the FCC declined to require incumbent LECs to provide unbundled access to their hybrid loops for the provision of broadband services. According to the Telco, the FCC found that ILECs are not required to unbundle their next generation network, packetized capability of their hybrid loops to enable requesting carriers to provide broadband services to the mass market.¹¹¹

The Department disagrees with the Telco for a number of reasons. First and foremost, the Department has already determined that the HFC network is a network element that should be unbundled. Secondly, the FCC has required incumbent LECs to make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facility has already been constructed and does not include the construction of new wires. Additionally, the FCC has addressed loop facilities and deployment in the TRO. Specifically, the FCC has required that loops consisting of either all copper or hybrid copper/fiber facilities must be provided on an unbundled basis so that requesting carriers may provide narrowband services over those facilities. In the instant case, Gemini has committed to offering the FCC's qualifying services over facilities that have been abandoned by the Telco.¹¹² The FCC also required ILECs to continue to provide unbundled access to the TDM features, functions, and capabilities of their hybrid loops. According to the FCC, this would allow CLECs to continue to provide traditional narrowband services and high capacity services like DS1 and DS3 circuits.¹¹³

¹⁰⁹ See the Telco's September 26, 2003 Reply Comments pp.13-18.

¹¹⁰ *Id.*, p. 13.

¹¹¹ Telco September 26, 2003 Reply Comments, pp. 23 and 24.

¹¹² Throughout the Company's September 26, 2003 Reply Comments, the Telco maintains that Gemini is prohibited from offering "broadband" services over its HFC network. (See for example, those comments, pp. 24, 25 (and fn. 63) and 26. The Department notes that the Company in these discussions fails to acknowledge Gemini's commitment and that the FCC has permitted the offering of such services which may be combined with broadband-type services in order to offer subscribers a full complement of telecommunications and information services. TRO, ¶¶143 and 146.

¹¹³ *Id.*, ¶199, fn. 627.

While the TRO does not address the unique circumstances of the HFC network, the FCC recognizes that its obligation to encourage infrastructure investment tied to legacy loops is more squarely driven by facilitating competition and promoting innovation. Because incumbent LECs have already made the most significant infrastructure investment, the FCC has sought to encourage both intramodal and intermodal carriers (in addition to ILECs) to enter the broadband mass market and make infrastructure investments in equipment. The FCC also expects that more innovative products and services will follow the deployment of new loop plant and associated equipment.¹¹⁴ In light of the above, the Department reaffirms its conclusion that the HFC network should be unbundled.

As long as Gemini offers the FCC's qualifying services, the Telco's HFC network must be unbundled. Accordingly, the Telco's argument that facilities or network elements must be used for telecommunications services before they can be unbundled is hereby dismissed. Although the Telco's HFC network is currently in a state of disrepair, the Department expects that the Company will, as required by the TRO, take the necessary actions required to afford access to those facilities sought by its competitors. The Department also finds that Gemini has committed to performing the necessary upgrades and repair to the HFC network to accommodate its provision of qualifying services. Consequently the Telco's concern that the HFC network is not capable of providing telecommunications services without significant modification is also without merit.

c. Necessary and Impairment Standard

i. Is Access to the HFC Network Necessary?

The Telco argues that §251(d)(2) of the Telcom Act requires the consideration of whether a network element is necessary and whether the failure to allow access to that element would impair Gemini's ability to provide the services it seeks to offer.¹¹⁵ The Telco further claims that the Department must determine that access to the facilities is necessary and that failure to provide access would impair the ability of the telecommunications carrier to provide the services it seeks to offer.¹¹⁶ The Telco maintains that Gemini will not be impaired without access to the Company's HFC network nor can Gemini demonstrate that such access is required by §251(d)(2) of the Telcom Act.¹¹⁷

The Department disagrees. First, the FCC has determined that the "necessary standard" applies only to proprietary network elements. Additionally, the FCC adopted standards that aid in the determination of whether a network element is proprietary in nature. Specifically, the FCC determined that (footnotes omitted):

¹¹⁴ TRO, ¶244.

¹¹⁵ Telco Brief, p. 20.

¹¹⁶ Telco Reply Brief, p. 6.

¹¹⁷ *Id.*, pp. 20-24.

We find that if an incumbent LEC can demonstrate that it has invested resources (time, material, or personnel) to develop proprietary information or network elements that are protected by patent, copyright, or trade secret law, the product of such an investment is “proprietary in nature” within the meaning of section 251(d)(2)(A). This definition is consistent with the 1996 Act’s policy of preserving the incumbent LECs’ innovation incentives. It is also consistent with the Commission’s conclusion, in the *Local Competition First Report and Order*, that in some instances it will be “necessary” for new entrants to obtain access to proprietary elements. Finally, our decision to define interests that are “proprietary in nature” along established intellectual property categories is consistent with the Department of Justice and Federal Trade Commission “Guidelines for the Licensing of Intellectual Property.”¹¹⁸

The FCC reaffirmed this determination even though it had sought comment on whether to change that interpretation of “necessary” established in the UNE Remand Order. According to the FCC, it declined to make that change. The FCC states that the D.C. Circuit Court did not remand that issue back to the Commission, vacate the necessary standard nor did it instruct the FCC to consider it further.¹¹⁹

The Department does not believe that the “necessary standard” applies because, throughout this proceeding, the Company has argued that the HFC network has been abandoned,¹²⁰ and therefore, it is not proprietary. Nor has the Telco offered evidence meeting the criteria established in the UNE Remand Order.¹²¹ Finally, relative to Conn. Gen. Stat. §16-247b(b), the Department finds that Gemini has presented significant evidence supporting its request that the HFC network be unbundled because it is necessary in the provision of the FCC’s qualifying services. Specifically, the Telco HFC network offers Gemini an architecture that is more advanced and efficient than that of the Company’s existing copper twisted pair. Gemini’s access to the HFC network is also necessary because otherwise, it would be required to replicate an existing network, in direct conflict with Conn. Gen. Stat. §16-247a(5). Accordingly, the Department finds that the HFC Network is not subject to the “necessary standard,” and meets the requirements of the Connecticut statutes.

ii. Impairment Standard

The FCC addressed the shortcomings of the UNE Remand Order’s “impairment” standard raised by the DC Circuit Court in the TRO.¹²² Specifically, the FCC has interpreted the language, structure, purposes, and history of the impair standard in a manner that is faithful to the Telcom Act and Congress’ intent, that responds fully to the

¹¹⁸ UNE Remand Order, ¶¶ 35 and 36.

¹¹⁹ TRO, ¶171.

¹²⁰ See for example the Telco’s January 21, 2003 Motion to Dismiss the Petition Filed by Gemini Networks CT, Inc. or, in the Alternative, Motion to Stay and/or Bifurcate Issues and Request for Procedural Order, p. 3.

¹²¹ Specifically, the Company did not demonstrate that it has invested resources to develop proprietary information or network elements that are protected by patent, copyright or trade secret law. UNE Remand Order, ¶35.

¹²² TRO, ¶¶61-169.

courts and is economically rationale.¹²³ According to the FCC, it has been “instructed” by the Telcom Act to consider whether the failure to provide access to network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.¹²⁴ Consequently, it has fashioned its “impairment standard” based on that instruction.¹²⁵ In light of the TRO and the Telcom Act, the Department, as the following analysis illustrates, has relied on the TRO in its determination as to whether Gemini would be impaired without access to the Telco’s HFC network.

The FCC has identified a number of “barriers to entry” that could cause impairment to prospective competitors entering a market. In the opinion of the Department, these “barriers” go directly to the heart of the Petition, and satisfy the Telcom Act’s impairment standard. In particular, the FCC has determined that a requesting carrier would be impaired when lack of access to an incumbent LEC network element posed a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.¹²⁶ Relative to the instant case, Gemini could be impaired operationally if it were required to purchase network facilities that it deems are inferior to that of the HFC network.¹²⁷ Likewise, Gemini could be impaired economically¹²⁸ if it were required to construct its own facilities.¹²⁹ Gemini also, in light of the TRO, experiences “first-mover advantage” barriers to entry.¹³⁰ In this instance, Gemini is subjected to this barrier to entry because the Telco has experienced preferential access to rights-of-way, and possesses sunken capacity, and operational difficulties¹³¹ that have already been addressed when it constructed its HFC network as a monopolist.¹³² Gemini also suffers from brand name preference¹³³ (another first-mover advantage barrier) that the Telco currently enjoys.¹³⁴ Gemini would also be at a disadvantage in constructing its own network relative to the Telco because the Company was able to construct its HFC network with revenues generated from its monopoly customers.¹³⁵ A related issue are the costs that Gemini would incur in securing pole attachment licenses from the Telco for its own network in

¹²³ Id., ¶69.

¹²⁴ Id., ¶71.

¹²⁵ Id.

¹²⁶ TRO, ¶84.

¹²⁷ Gemini Response to TELCO-4, p. 3.

¹²⁸ Id.

¹²⁹ The FCC has committed to considering business cases analyses if they provide evidence at a granular level concerning the ability of competitors economically to service the market without the UNE in question. Id., ¶99.

¹³⁰ Gemini September 12, 2003 Written Comments, pp. 8 and 9.

¹³¹ Id., p. 8.

¹³² TRO, ¶89.

¹³³ Gemini September 12, 2003 Written Comments, p. 9.

¹³⁴ TRO, ¶89.

¹³⁵ Gemini September 12, 2003 Written Comments, p. 7. Related to this issue is the capital requirements barrier. In this case, some entrants are at a disadvantage when compared to the incumbents when raising large amounts of capital. TRO, fn. 248. The FCC cites as three possible reasons: entrants are a riskier investment, small entrants face higher transaction costs to raise funds, and the capital market is imperfect such that large firms have more market power to obtain loans at favorable rates. Id. In comparing the Telco (and its parent, SBC) to Gemini, the Department concludes that Gemini would likewise experience impairment from this barrier to entry.

the event access to the Telco's HFC network is prohibited.¹³⁶ Specifically, Gemini would unnecessarily experience make ready costs to either remove the Telco's existing facilities from its utility poles or replace those poles in their entirety to accommodate the addition of Gemini's facilities. In the opinion of the Department, the associated costs of this activity make market entry for Gemini uneconomical.

The Department also believes that the Telco's imposition of its existing services and requirement that Gemini utilize those services instead of the facilities that Gemini has sought in the Petition would seriously harm, if not destroy, Gemini's business plan and business.¹³⁷ Gemini has implemented a technical plan that relies in part, and complements the Company's HFC network. To require Gemini to utilize UNEs other than the HFC network conflicts with the FCC's finding that lack of access to an ILEC incumbent network element would make entry into a market uneconomic.¹³⁸ Acceptance of the Company's other services as a means of offering its own services would require Gemini to construct a duplicate network and would also conflict with Conn. Gen. Stat. §16-247a(5)).

Gemini has expressed a need for certain facilities that offer the functions and features that can be provided from the HFC network. Only the Telco's HFC network facilities (together with its requirement that it make those facilities available to its competitors) can satisfy those service needs. Gemini argues that the provision of telecommunications services over the HFC network is far superior in speed and consistency than over the existing copper network, based on its own experience operating its HFC network. The Department accepts that argument. While the Telco was unable to successfully utilize the HFC network, Gemini believes that it possesses a business plan that can make that network useful. For example, Gemini claims that its HFC-based architecture is faster and provides more consistent speeds for data transmission that do not occur over a twisted copper network.¹³⁹ Acceptance of the Telco's proposed alternative UNEs would, in the opinion of Gemini, force an architecture consisting of technologically inferior facilities.¹⁴⁰ Therefore the Department concludes that given the timing of the Petition, the type of Gemini's network architecture should not be considered a factor against requiring the unbundling of the Telco's HFC network.

Moreover, the Department finds that the FCC has declined to accept the SBC argument that requesting carriers are not necessarily impaired if they can use ILEC resold or retail tariffed services to provide their retail services.¹⁴¹ The FCC concluded that it would be inconsistent with the Telcom Act if it permitted the ILEC to avoid all unbundling merely by providing resold or tariffed services as an alternative. The FCC also determined that such an approach would give the ILEC unilateral power to avoid unbundling at long run incremental rates simply by voluntarily making elements available at some higher price. Lastly, the FCC concluded that forcing requesting

¹³⁶ Gemini Response to TELCO-4, p. 3; Gemini September 12, 2003 Written Comments, p. 8.

¹³⁷ Gemini Response to Interrogatory TELCO-4, p. 2.

¹³⁸ TRO, ¶84.

¹³⁹ Gemini Response to Interrogatory TELCO-4, p. 2.

¹⁴⁰ *Id.*

¹⁴¹ TRO, ¶102.

carriers to rely on tariffed offerings would place too much control in the hands of the ILECs, which could subsequently alter their tariffs and thereby engage in a vertical price squeeze.¹⁴² The Department finds that requiring Gemini to utilize Telco facilities/services other than those sought in the Petition, would impair Gemini's entry into the market and its service offering to consumers and conflict with the TRO.¹⁴³

D. HFC NETWORK DISPOSITION PLAN

The OCC protested the Telco's removal of portions of the HFC network without notice, subsequent to SPV's market withdrawal.¹⁴⁴ The OCC alleges that the Telco's removal of any HFC facilities is contrary to the Department's express directive that those assets be preserved to foster future competitive market entry by other service providers.¹⁴⁵ The OCC also objected to the Telco's claim that it cannot now offer access to HFC network elements because they have been removed or are so disjointed as to preclude connectivity via a lease arrangement.¹⁴⁶ Moreover, the OCC criticizes the Telco's record keeping practices associated with the removed HFC plant, as well as the Company's claim that the Department ceded jurisdiction over those assets by directing the Telco to assign associated costs to shareholders.¹⁴⁷

In Docket No. 00-08-14, the Telco expressed a willingness to assist in developing a network transport arrangement for a potential cable provider, using all or portions of the HFC network, and the Department strongly encouraged the Telco to work with prospective video services providers to achieve that goal.¹⁴⁸ Nevertheless, to ensure that the Telco undertook no action with respect to disposition of any piece of the HFC network or assets that may be subject to a claim that the Company was thwarting competition, the Department ordered the Company to develop an organized disposition plan. The disposition plan was subsequently filed with and approved by the Department.¹⁴⁹

¹⁴² *Id.*

¹⁴³ The Telco argues that based on binding federal court and FCC decisions, the Department may not employ individualized or business-specific impairment analysis. The Telco also argues that the Department does not have the discretion to ignore the D.C. Circuit Court's USTA decision and the FCC's conclusions in the TRO on this very issue. Telco Written Exceptions, p. 29. The Department is not persuaded by the Telco's argument. The FCC has indicated that it would consider various evidence as part of its impairment analysis. Specifically, the FCC indicated that it would give consideration to cost studies, *business case analyses*, and modeling if they provide evidence at a granular level concerning the ability of competitors economically to serve the market without the UNE in question (emphasis added). TRO, ¶99. In light of that discussion, it is clear to the Department that individual business cases may hold some weight in an impairment analysis and not be totally rejected as alleged by the Telco. As indicated above, Gemini has presented strong evidence (in addition to a business case analysis) that it would be impaired without access to the Telco HFC network. In the opinion of the Department, while Gemini has provided convincing evidence of impairment, its business case merely adds more weight to that finding; and therefore, the Telco's argument is dismissed.

¹⁴⁴ OCC Brief, pp. 12 and 13.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*, p. 12.

¹⁴⁷ *Id.*, pp. 12 and 13.

¹⁴⁸ Relinquishment Decision, pp. 23 and 24.

¹⁴⁹ Filings dated May 1, 2001, and September 1, 2001, in response to Order Nos. 1 and 2 in Docket No. 00-08-14.

From the time SPV ceased providing service in June 2001, miles of coaxial plant have lain idle. Since then, the Telco has removed coaxial distribution facilities and continues to dispose of them as conditions dictate. For example, during certain road construction projects, and in the case of plant damage and other situations, the Telco has removed and not replaced certain coaxial facilities because they were no longer in use. The Telco explains that if those coaxial distribution facilities were part of the Company's network, it would not be disposing of them.¹⁵⁰

The Telco's removal of portions of the HFC network including coaxial plant since SPV's demise is not revelatory for the Department. The Telco's decision to not restore or replace unused coaxial plant damaged by storms, motor vehicle accidents, or otherwise abandoned when poles must be shifted is pragmatic and cost-effective. While the Department remains focused on fostering an environment conducive to market entry by a successor competitive cable operator, it would be unwise to require the Telco to continue to maintain and replace unused coaxial plant in perpetuity, or to require the Company to maintain and replace unused plant in the same manner in which it maintains and replaces its used plant. No evidence was presented in this proceeding that the Telco's removal of coaxial facilities was an attempt to thwart competition or impair network connectivity for a subsequent service provider. Additionally, removal of such unused plant typically does not invoke the same level of record keeping and network mapping that would be expected of the Company's energized network.

E. TELCO AND GEMINI INTERCONNECTION AGREEMENT

In the November 3, 2003 Draft Decision (Draft Decision) after concluding that the HFC network was capable of, and should be unbundled, the Department also required that the Telco: (1) provide Gemini with an inventory of the existing HFC network components by February 1, 2004;¹⁵¹ (2) develop a total service long run incremental cost of service study to cost and price the HFC network UNEs in accordance with established Department requirements (TSLRIC); and (3) locate and engage a vendor that would be responsible for developing an HFC network OSS.¹⁵²

The Telco claims and Gemini has agreed,¹⁵³ that the Department may have exceeded the provisions of its February 10, 2003 response to the Telco Request (i.e., whether the HFC network was subject to unbundling pursuant to Conn. Gen. Stat. §16-247b(a) and once such a determination was made, whether these network facilities could be subject to arbitration as provided for by §252 of the Telcom Act).¹⁵⁴ The Telco also maintains that before the Company can be required to provide an unbundled

¹⁵⁰ Telco Brief, p. 11.

¹⁵¹ The Department further required that the Telco and Gemini share in the cost of developing the HFC network inventory. However, during Oral Argument, Gemini noted that SPV had filed a network inventory on May 1, 2001, in compliance with the Decision in Docket No. 00-08-14. While recognizing that some of the HFC network plant has been removed since the Telco's compliance filing, Gemini is of the opinion that the amount of plant removed is minimal and is willing to accept the May 1, 2001 filing thus negating the need for the Telco to conduct another inventory. Tr.12/10/03, pp. 56-59.

¹⁵² Draft Decision, pp. 44 and 45, 49 and 50.

¹⁵³ See for example, Tr. 12/10/03, pp. 42 and 43, 49 and 50.

¹⁵⁴ Department February 10, 2003 Letter to Attorneys Garber and Janelle, p. 4.

network element, the Department must first require Gemini to negotiate an interconnection agreement.¹⁵⁵ The Department agrees.

Sections 251 and 252 of the Telcom Act and Conn. Gen. Stat. §16-247b(a) provide the terms and conditions for the unbundling of incumbent UNEs, the interconnection of ILEC and CLEC networks, and the procedures under which access to those networks should be negotiated. In the event that those negotiations are unsuccessful, §252 of the Telcom Act also provides the procedures the parties must follow when seeking arbitration before state commissions. As the Department has determined that the HFC network is subject to unbundling, Congress has imposed on the ILEC (i.e., the Telco), the duty to negotiate in good faith, an interconnection agreement that would provide Gemini access to those network elements.¹⁵⁶

Therefore, Gemini and the Telco must negotiate an interconnection agreement that would provide access to the HFC network. The Department expects the parties to address costing and pricing of the HFC UNEs (i.e., that it is conducted in accordance with federal and state law) and the development of HFC network OSS as part of those negotiations. In order to ensure that negotiations proceed in a timely fashion, Gemini and the Telco will be required to present to the Department, a proposed time schedule listing the dates of each negotiation session and the expected topic(s) that are to be addressed during that session. Additionally, the Department will require that at the conclusion of each session, the Telco and Gemini to file a brief summary of each negotiating session and whether the issue(s) negotiated during that session were resolved.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Gemini has requested the Department issue a Declaratory Ruling finding that certain HFC facilities owned by the Telco constitute UNEs and as such, must be tariffed and offered on an element by element basis at TSLRIC pricing.
2. This proceeding has been bifurcated to address the legal issues during this phase.
3. On December 29, 1994, as revised on April 11, 1995, the Telco filed its I-SNET Technology Plan with the Department.
4. The intent of I-SNET was to be a full service network that would provide a full suite of voice, data and video services.
5. The goal of I-SNET was to transform Connecticut's existing infrastructure into a robust, multifunctional core capable of supporting a variety of information, communications and entertainment applications.

¹⁵⁵ Telco Written Exceptions, pp. 52-54.

¹⁵⁶ Section 251(c)(1) of the Telcom Act.

6. I-SNET was intended to supersede the Company's existing infrastructure and address the state's emerging, broadband, communications requirements.
7. With the complete deployment of I-SNET, the Company expected its telecommunications infrastructure to transform to an end-to-end broadband network, capable of providing full service network capabilities to all Connecticut subscribers.
8. The Department has determined that it was in the public interest that the Telco be afforded the opportunity to provide business and residential customers the benefits of new telecommunications technologies.
9. The Department permitted the Company to include for purposes of depreciation, an allowance for the plant that would be retired due to the I-SNET deployment. This allowance would subsequently be recovered from the Telco's customers.
10. The Department determined that the Telco would, through the implementation of I-SNET improve productivity and control costs while maintaining the quality of service necessary to retain existing customers and attract new ones.
11. As part of the Telco's approved Alt Reg Plan, the Department employed the Company's service standard objectives in place at that time as a starting point, and over the course of the Alt Reg Plan, increased the minimum objectives based in part on the Telco's expected improvement in service quality resulting from its infrastructure modernization plan.
12. Beginning in 1996 many large telecommunications companies began to retreat from HFC leading to Lucent's abandonment of the HFC technology; however, the Telco decided to continue to deploy the HFC technology.
13. Presently, no incumbent local telephone company, including the Telco, offers both telephony and CATV services over an HFC network.
14. The Company did not identify or differentiate the facilities that would be used for telecommunications services (i.e., voice and data) and those that would be used to support the offering of CATV services in its I-SNET plan.
15. Based on the intended use of the HFC network, the Telco sought, and was granted favorable regulatory treatment relative to depreciation and alternative regulation.
16. As a result of the Telcom Act and Connecticut Public Acts 94-83 and 99-122, certain responsibilities and obligations have been imposed on the Telco in order to promote telecommunications competition in the state.
17. The Telcom Act requires the ILECs to make available to CLECs, access to UNEs at reasonable, nondiscriminatory terms and conditions.

18. The FCC concluded that access to an UNE refers to the means by which requesting carriers obtain an element's functionality in order to provide a telecommunications service.
19. The FCC has determined that an ILEC's duty to provide access constitutes a duty to provide a connection to a network element independent of any duty imposed by §251(c)(2) of the Telcom Act and that such access must be provided under the rates, terms, and conditions that apply to unbundled elements.
20. Section 251(d)(3) of the Telcom Act provides the Department the independent authority it requires to direct the unbundling of ILEC network elements.
21. The FCC reaffirmed its definition of a network element as requiring ILECs to make available to requesting carriers network elements that are capable of being used in the provision of a telecommunications service.
22. The purpose of the Telcom Act supports requiring incumbent LECs to provide access to network elements to the extent those elements are capable of being used by the requesting carrier in the provision of a telecommunications service.
23. A network element is a facility or equipment used in the provision of a telecommunications service and includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.
24. In order to gain access to UNEs, carriers must provide qualifying services using the UNEs to which they seek access.
25. Qualifying services are defined as those telecommunications services that are offered by requesting carriers in competition with those that have been traditionally the exclusive or primary domain of the ILECs (e.g., local exchange service, such as POTS and access services, such as xDSL and high capacity circuits).
26. Once a requesting carrier has obtained access to a UNE in order to provide a qualifying service, the carrier may use that UNE to provide any additional services, including non-qualifying telecommunications and information services.
27. Allowing requesting carriers to use UNEs to provide multiple services on the condition that they are also used to provide qualifying services will permit carriers to create a package of local, long distance, international, information, and other services tailored to the customer.
28. Gemini has committed to offering qualifying telecommunications services over the HFC network.

29. Loops consisting of either all copper or hybrid copper/fiber facilities must be provided on an unbundled basis so that requesting carriers may provide narrowband services over those facilities.
30. The FCC has recognized its obligation to encourage infrastructure investment tied to legacy loops is more squarely driven by facilitating competition and promoting innovation.
31. Gemini has committed to performing the necessary upgrades and repair to the HFC network to accommodate its provision of qualifying services.
32. The “necessary standard” applies only to proprietary network elements.
33. An ILEC’s failure to provide access to a network element would impair the ability of a requesting carrier to provide the services it seeks to offer if, after taking into consideration the availability of alternative elements outside of the incumbent’s network, lack of access to that element diminishes a requesting carrier’s ability to provide its services.
34. The FCC has identified a number of “barriers to entry” that could cause impairment to prospective competitors entering a market.
35. A requesting carrier would be impaired when lack of access to an incumbent LEC network element posed a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.
36. The FCC has declined to accept the SBC argument proffered during the Triennial Review Proceeding that requesting carriers are not necessarily impaired if they can use ILEC resold or retail tariffed services to provide their retail services.
37. The FCC concluded that it would be inconsistent with the Telcom Act if it permitted the ILEC to avoid all unbundling merely by providing resold or tariffed services as an alternative because it would give the ILEC unilateral power to avoid unbundling at long run incremental rates simply by voluntarily making elements available at some higher price.
38. The FCC concluded that forcing requesting carriers to rely on tariffed offerings would place too much control in the hands of the ILECs, which could subsequently alter their tariffs and thereby engage in a vertical price squeeze.
39. Requiring Gemini to utilize Telco facilities/services other than those sought in the Petition, could impair Gemini’s entry into the market and its service offering to customers and conflict with the TRO.
40. Sections 251 and 252 of the Telcom Act and Conn. Gen. Stat. §16-247b(a) provide the terms and conditions for interconnection of ILEC and CLEC networks and the procedures under which access to those networks are to be negotiated. In the event that negotiations are unsuccessful, §252 of the Telcom Act provides

the procedures under which the parties may seek arbitration before the state commissions.

41. Gemini and the Telco must negotiate an interconnection agreement that would provide Gemini access to the Telco's HFC network and unbundled network elements.

VI. CONCLUSION AND ORDERS

A. CONCLUSION

I-SNET was originally deployed to provide the Telco with a full complement of narrowband and broadband services (i.e., voice, data and video). In light of 47 U.S.C. §153(29), the Telco's HFC network meets the definition of a network element. Although the federal requirements relative to meeting the "necessary" standard do not apply, Gemini has satisfactorily demonstrated that access to the Telco's HFC network is necessary for the provision of its own services pursuant to Conn. Gen. Stat. §16-247b(b). Additionally, Gemini will be impaired as it will experience a number of barriers to entry as identified by the FCC in the TRO. Therefore, the Telco's HFC network is capable of providing telecommunications services and for purposes of this proceeding, is subject to the federal and state unbundling requirements. Unbundling that network is consistent with the Telcom Act because it accomplishes what that act intended to do, afford Gemini access to UNEs that it does not already possess in order to provide service offerings in direct competition with the incumbent LEC (i.e., the Telco). Accordingly, the Telco's HFC network should be unbundled in accordance with the orders listed below. In order for Gemini to gain access to the unbundled HFC network, it should negotiate an interconnection agreement with the Telco pursuant to §252 of the Telcom Act.

B. ORDERS

For the following Orders, please submit an original and 3 copies of the requested material, identified by Docket Number, Title and Order Number to the Executive Secretary.

1. No later than January 30, 2004, the Telco and Gemini shall file with the Department, a proposed time schedule listing the dates of the negotiation sessions and the expected topic(s) that are to be addressed during each session.
2. No later than five business days following the conclusion of each negotiation session, the Telco and Gemini shall file a brief summary indicating the topics covered and the issue(s) resolved, if any during that session.

**DOCKET NO. 03-01-02 PETITION OF GEMINI NETWORKS CT, INC. FOR A
DECLARATORY RULING REGARDING THE SOUTHERN
NEW ENGLAND TELEPHONE COMPANY'S UNBUNDLED
NETWORK ELEMENTS**

This Decision is adopted by the following Commissioners:

Jack R. Goldberg

John W. Betkoski, III

Donald W. Downes

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control

December 18, 2003
Date

Attachment H

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. P-19, SUB 477

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Interconnection Agreements with Competitive)	ORDER CONTINUING
Local Exchange Carriers and Commercial)	PROCEEDING INDEFINITELY
Mobile Radio Service Providers)	

BY THE COMMISSION: On February 20, 2004, Verizon South, Inc. filed for arbitration “of an Amendment to Interconnection Agreements with Competing Local Providers [CLPs] and Commercial Mobile Radio Service Providers [CMRS providers] in North Carolina” pursuant to Section 252 of the Telecommunications Act and the *Triennial Review Order* (TRO). As such, this consolidated arbitration petition involves nearly 70 CLPs and CMRS providers. Verizon is proposing an amendment to its interconnection agreements implementing changes in its network unbundling obligations pursuant to the TRO. More particularly, the petition was filed pursuant to the transition process that the FCC established in the TRO in Paragraphs 700 through 706. For the purposes herein, the term “CLPs” refers to both CLPs and CMRS providers.

Verizon explained that the FCC had provided that incumbent local exchange companies (ILECs) and CLPs must use the Section 252(b) “timetable for modification” of agreements; and, for the purposes of the negotiation and arbitration timetable, “negotiations [are] deemed to commence on the effective date” of the TRO, which was October 2, 2003. Verizon said the negotiations between itself and the CLPs in fact commenced on that date, because on October 2, 2003, Verizon sent a letter to each CLP initiating negotiations and proposing a draft amendment to implement the FCC’s rules. This means that the window for requests for arbitration is from February 14, 2004, to March 11, 2004. A ruling would need to be made by the Commission on or about July 2, 2004.

Verizon reported that, since the October 2, 2003 notice, some CLPs have signed Verizon’s draft amendment, without substantive changes; but, of the remaining CLPs in North Carolina, virtually none provided a timely response to Verizon. The majority of substantive responses have come in only lately. Some responses constitute a virtual wholesale rejection of the amendment.

Verizon, of course, noted the pendency of appeals before the D.C. Circuit and the other filings for reconsideration pending before the FCC. Verizon is filing this petition now, based on current federal law.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that good cause exists to continue this proceeding indefinitely pending further order and advise Verizon that it may avail itself of the provisions of Section 252(e)(5), wherein the arbitration may be referred to the FCC.

The reasons for these recommendations are several-fold:

First, the changes sought by Verizon appear to be of similar subject matter to those which are subject to the Commission's TRO proceeding. As such, this "consolidated arbitration" approximates a parallel TRO proceeding. This is a waste of everybody's time. It is especially so since Verizon informed this Commission on Halloween Day, 2003 that it would not actively participate in the TRO dockets, while reserving "its right to challenge these determinations at a later time." It also stated its belief that the FCC's TRO rules were "in direct conflict with the 1996 Telecommunications Act." This is strange considering that Verizon purports to desire the swift implementation of the FCC's rules in the context of its arbitration petition. The Commission does not have the resources or the inclination to conduct *two* TRO proceedings simultaneously.

Second, as alluded to by Verizon in its filing, the FCC rules are under challenge on many fronts. It makes no sense to begin an arbitration where the underlying rules may be changed in midstream.

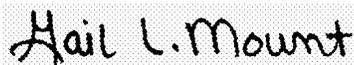
Third, Verizon did not comply with the Commission's arbitration procedural rules. It did not include prefiled testimony or seek waiver of same. It included no matrix summary. The petition did not appear to be signed by North Carolina counsel as required by our rules.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 3rd day of March, 2004.

NORTH CAROLINA UTILITIES COMMISSION



Gail L. Mount, Deputy Clerk

Attachment I

DT 04-018

VERIZON NEW HAMPSHIRE

**Petition for Consolidated Arbitration for an Amendment to the
Interconnection Agreements with Competitive Local Exchange
Carriers and Commercial Mobile Radio Service Providers**

Order Addressing Motions to Dismiss

ORDER NO. 24,308

April 12, 2004

I. PROCEDURAL HISTORY

On February 20, 2004, Verizon New Hampshire (Verizon) filed with the New Hampshire Public Utilities Commission (Commission) a Petition for Consolidated Arbitration (Petition), pursuant to 47 U.S.C. § 252(g). The Petition requests that the Commission arbitrate disputes between Verizon and Competitive Local Exchange Carriers (CLECs) and Commercial Mobile Radio Service (CMRS), or wireless, carriers relating to Verizon's October 2, 2003, proposed amendment to all interconnection agreements (Proposal).

By Order of Notice issued on March 8, 2004, the Commission made all Parties listed in the Petition mandatory Parties to this docket, and ordered each Party to submit a letter by March 12, 2004, confirming its need to amend its interconnection agreement and affirming its intent to participate in this proceeding.

Letters of intent and responses to Verizon's Petition were duly filed by: A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation, Broadview Networks Inc., Bullseye Telecom Inc., Choice One Communications of New Hampshire Inc., Comcast Phone LLC and its subsidiary Comcast Phone of New Hampshire LLC, Covad Communications/DIECA Communications Inc., DSCI Corporation, IDT America Corp., KMC Telecom III LLC, KMC

Telecom V Inc., and XO Communications Inc., (collectively, the Competitor Coalition); Adelphia Business Solutions Operations Inc. d/b/a Telcove, DSLnet Communications LLC, ICG Telecom Group Inc., Level 3 Communications LLC, Lightship Telecom LLC, and PaeTec Communications (collectively, the CLEC Coalition); AT&T of New England Inc. (AT&T); Biddeford Internet Company d/b/a Great Works Internet (GWI); Conversent Communications (Conversent); CTC Communications (CTC); Global Crossing; MCImetro Access Transmission Services LLC and New England Fiber Communications LLC (MCI); Revolution Networks (RevNets); RNK Telecom (RNK); United Systems Access Telephone (USAT); and Z-Tel Communications (ZTel). Nextel Communications of the Mid-Atlantic Inc. (Nextel), Sprint, OneStar, ARCH Wireless Operating Company Inc. (ARCH), and Cellco Partnership d/b/a Verizon Wireless and its affiliate AirTouch Paging d/b/a Verizon Wireless Messaging Services (Verizon Wireless) notified the Commission that they will not participate¹. The Office of the Consumer Advocate (OCA) notified the Commission of its intent to participate in the docket.

On March 12, 2004, RevNets filed a Motion to Dismiss and requests for discovery, and on March 16, 2004, RevNets filed a second Motion to Dismiss and its Response to Verizon's Petition. On March 19, 2004, RevNets filed a Motion to Compel responses to discovery requests. GWI and the CLEC Coalition each filed Motions to Dismiss on March 16, 2004.

Verizon filed individual Responses to RevNets, GWI, and the CLEC Coalition's several Motions to Dismiss on March 25, 2004, and commented on ZTel's response to the Order of Notice. Verizon filed an Opposition to RevNets Motion to Compel on March 29, 2004.

¹ Nextel and ARCH affirm that, since they do not purchase or plan to purchase the relevant unbundled network elements (UNEs), they have no need or desire to amend their existing interconnection agreements with Verizon. Sprint states that it has no current interconnection agreement with Verizon, and purchases UNEs out of Verizon's Statement of Generally Available Terms and Conditions (SGAT). OneStar affirms that it is no longer certified to provide service in New Hampshire. Verizon Wireless stated it expects to be dismissed as a Party subsequent to filing a stipulation of dismissal with Verizon.

On April 2, 2004, the CLEC Coalition submitted a Reply to Verizon's Opposition to the CLEC Coalition's Motion to Dismiss and MCI filed a response to the Motions to Dismiss filed by RevNets and the CLEC Coalition. Verizon filed its Surreply Regarding the CLEC Coalition's Motion to Dismiss on April 9, 2004.

Procedural issues and the Motions to Dismiss are addressed herein. As a result of the Commission's action on the procedural issues, it is unnecessary to address the substance of Verizon's Petition in this Order.

II. POSITIONS OF THE PARTIES AND STAFF

A. Verizon

Verizon states that the proposed amendment implements requirements of the Federal Communications Commission's (FCC) *Triennial Review Order (TRO)* FCC Rcd 17405. Verizon claims that the *TRO* deems that negotiation of interconnection agreements commences upon the effective date of the *TRO* (§§703-704) and that Verizon in fact initiated negotiations on that date by issuing a letter to each CLEC informing the CLECs that a draft amendment was available to implement the rules promulgated in the *TRO* (October 2 Letter). Verizon contends that its Petition is filed pursuant to the arbitration window (February 14, 2004 to March 11, 2004) established by 47 U.S.C. § 252(b)(1) and the *TRO* at §703. Further, Verizon says that a ruling is required within nine months of October 2, 2003, which is approximately July 2, 2004.

In its response to RevNets' Motion to Dismiss, Verizon states that its Petition is timely as it was filed within the window prescribed by the *TRO* and the *Telecommunications Act of 1996 (TAct)*, and that Verizon has attempted to negotiate in good faith while RevNets has failed to respond to Verizon's proposals. In response to GWI, Verizon stated that GWI's assertion that the arbitration await the results of separate proceedings concerning the *TRO* was unreasonable, and

indicated that this Commission's action in January, 2004, to open an arbitration docket on behalf of certain CLECs (DT 03-208) is evidence that the issues regarding implementation of the *TRO* for the SGAT and for CLEC interconnection agreements are not duplicative. As for the CLEC Coalition's Motion to Dismiss, and the CLEC Coalition's Reply to Verizon's Opposition, Verizon asserts that the terms of the GTE/Bell Atlantic Merger have run their course and do not apply to the *TRO*. Verizon claims that its Petition meets the requirements of §252 of the *TAct*, that prompt implementation of the terms of the *TRO* is a critical Commission responsibility and should not be delayed pending appeals of the *TRO* and finally that the FCC's new network modification rules constitute a change in law. Verizon disagrees with ZTel's assertion that Verizon did not properly request negotiations, and states that Verizon retained its rights to amend its Proposal to conform with the holdings of *United States Telecom Association v. Federal Communications Commission* 359 F. 3d 554 (D.C. Cir. 2004) (*USTA II*). In response to the Parties' assertions that Verizon did not comply with the requirements of the *TAct* §252(b)(2), Verizon argues that the *TRO* doesn't mandate compliance with the formal requirements of §252(b). The *TRO* requires compliance, Verizon asserts, only with the time table for modifications of agreements. Verizon requests that the various Motions to Dismiss be denied.

B. RevNets

RevNets states that it has no need to amend its interconnection agreement with Verizon at this time, and that Verizon's Petition is unlawful, unnecessary and premature. RevNets believes that Verizon overstates the language of the *TRO*, and has failed to show that it has engaged in good faith negotiations. RevNets also claims that Verizon's letter was inadequate to establish the commencement of negotiations, and that Verizon has not met the evidentiary burden required by

§252(b) in support of its request for arbitration. RevNets requests that the Commission dismiss the Petition and close this proceeding.

RevNets requested that the Commission address its Motion to Dismiss and other preliminary Motions prior to requiring a detailed response concerning the substantive objections to Verizon's Proposal. RevNets noted recent actions on the part of the Maryland and North Carolina Commissions, both of which declined to act on Verizon's Petitions.

C. GWI

GWI joins with RevNets' Motion to Dismiss, and requests a stay of the proceeding, contending that Verizon has failed to negotiate in good faith, and that the Proposal does not accurately reflect Verizon's obligations under the *TRO*.

D. ZTel

ZTel contends that Verizon has never sought to amend its interconnection agreement. ZTel describes Verizon's October 2 Letter as a notice of the discontinuance of certain UNEs, none of which ZTel purchases from Verizon. The October 2 Letter, according to ZTel, did say that carriers wishing to amend their agreements should contact Verizon, but did not state that Verizon itself wished to amend its existing agreement with ZTel. Therefore, according to ZTel, since ZTel has no need or desire to amend its interconnection agreement, it claims that the arbitration window has not yet opened.

E. Competitor Coalition

The Competitor Coalition states that Verizon's Petition is insufficient to meet the mandates of a request for arbitration under §252 of the *TAct*, and that Verizon's Proposal should be amended within 60 days to reflect the decisions made by the D. C. Circuit Court in *USTA II*. Nonetheless, the Competitor Coalition requests that the Commission assert jurisdiction over the

matters at issue, maintaining the status quo until interconnection agreement amendment issues are resolved.

F. RNK

RNK supports the request of GWI for a stay in this proceeding, until the legal defects of Verizon's Petition are cured, and until the Commission rules on RevNets' Motion to Dismiss.

G. MCI

While MCI is willing to proceed on a consolidated basis, contending that there are some issues that will lend themselves to consolidated treatment, it reserves the right to argue the following: 1) the extent and degree to which the arbitration should be conducted on a consolidated basis; 2) that the change-of-law provisions in the existing interconnection agreements, rather than the provisions of the *TRO*, govern the negotiation timetable; and 3) that Verizon has independent obligations under State law and §271 of the *TAct* to provide network elements that are affected by the *TRO*, and those obligations should be included in any amendments to interconnection agreements.

In response to the Motions to Dismiss of RevNets and the CLEC Coalition, MCI contends that other carriers have no right to object to an MCI/Verizon arbitration, and declares that any procedural deficiencies can be quickly cured. MCI does not believe *USTA II* should delay this proceeding and requests that the Commission deny the Motions to Dismiss. Alternatively, MCI requests that, if the Commission denies Verizon's request for a consolidated arbitration, that the Commission proceed with arbitration proceedings for those CLECs, such as MCI, that wish to go forward with arbitration.

H. Conversent

Conversent contends that Verizon's attempts to negotiate an amendment to its interconnection agreements have consistently failed to recognize Verizon's future obligations under §271 of the *TAct*. Conversent states that Verizon is seeking, through these amendments, to eliminate its obligation to provide certain UNEs, in contradiction to Verizon's obligations under the SGAT, Commission rulings, the *TRO*, and §271.

I. CLEC Coalition

The CLEC Coalition states that Verizon's Petition should be dismissed for the following reasons: 1) the Petition is premature because under the Bell Atlantic/GTE Merger conditions, Verizon is required to offer UNEs under existing agreements until the *TRO* is final and non-appealable; 2) the Petition fails to comply with significant procedural requirements that are mandated by law; 3) because the law is too uncertain to efficiently arbitrate all of the issues; and 4) the *TRO* does not change the law with respect to routine network upgrades. In its Reply to Verizon's Opposition to the CLEC Coalition's Motion to Dismiss, the CLEC Coalition reaffirmed its prior argument.

J. AT&T

AT&T urges the Commission to undertake the arbitration in a timely manner, in order to be able to meet the 9-month time constraints. In response to the CLEC Coalition's Motion to Dismiss, AT&T claims that Verizon has met its §252 obligations with respect to its negotiations with AT&T. AT&T asserts that it will be harmed if the Commission grants the Motion to Dismiss.

III. COMMISSION ANALYSIS

The changes sought by Verizon in its Proposal appear to be very similar to those which are being considered in Docket No. DT 03-201, Revisions to Verizon New Hampshire's

Statement of Generally Available Terms and Conditions (SGAT). Some of the Parties in that docket have requested that Verizon identify all the changes resulting from its interpretation of the *TRO*. It appears that Verizon has done so in this Petition. Because CLECs are not required to negotiate interconnection agreements in New Hampshire in order to operate and purchase UNEs, and since many CLECs purchase directly from the SGAT, DT 03-201 is a more appropriate proceeding for the consideration of wholesale changes to the availability of network elements, and the rates, terms and conditions under which network elements are offered to CLECs in New Hampshire.

Of course, if Verizon and individual CLECs wish to negotiate different rates, terms and conditions than those in the SGAT, they are free to enter into negotiations pursuant to §252 of the TAct.

If however, Verizon wishes to proceed with its request for consolidated arbitration of multiple interconnection agreements due to a change in federal law, we conclude that this Commission is not the appropriate forum for such arbitration. As contemplated by the TAct at §252(e)(5) if a state does not act, the FCC will act in its stead. Rather than “run out the clock” until July 2, 2004, at which point Verizon would be free to take its request to the FCC, we make clear by this order that we will not exercise our right to arbitrate these interconnection agreements. Verizon, therefore, is free to take the request to the FCC without further delay.

The decision to send this issue to the FCC is not taken lightly. Our reasons are many. First, the strain on New Hampshire resources would be enormous given the number of arbitration agreements at stake. To meaningfully address all agreements, considering the various terms and conditions in each agreement, within the narrow window accorded by the TAct, is not feasible.

Second, the FCC's *TRO* made sweeping changes to ILEC unbundling obligations under §251 of the TAct. Changes to interconnection agreements requiring interpretation of the FCC's regulatory standards, such as have been occasioned by the *TRO*, are more appropriately dealt with by the FCC itself. If the request for arbitration were due to negotiation of a new interconnection agreement or renegotiation of an expired interconnection agreement between Verizon and one or more competitors in New Hampshire, we would likely reach a different result. For example, the Commission arbitrated an interconnection agreement between Verizon and Global NAPs in Docket No. DT 02-107. Here, however, the changes have nothing to do with operation in New Hampshire; they are the result of a change of rules promulgated by the FCC. In this case, we find it appropriate that Verizon take these issues up directly with the FCC.

Finally, we take this step as a matter of efficiency and resource conservation. The status of the applicable law remains in flux, as the D.C. Circuit decision on the *TRO* has reversed certain FCC decisions and is being challenged. It is not a prudent use of our limited state resources to arbitrate these agreements, on an expedited basis, only to face the possibility that the *TRO* standards will yet again be changed by the Circuit Court or U.S. Supreme Court.

For the foregoing reasons, we will notify the FCC of our intent not to address these interconnection agreements. Therefore, it is not necessary to rule on the motions to dismiss or the motion to compel filed by Revolution Networks. We direct our Executive Director to forward a copy of this order to the FCC.

Based upon the foregoing, it is hereby

ORDERED, that the Commission will not act on Verizon's Petition; and it is

FURTHER ORDERED, that the Executive Director forward a copy of this order to the FCC.

By order of the Public Utilities Commission of New Hampshire this twelfth day of
April, 2004.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

Attachment J

BEFORE THE PUBLIC UTILITIES COMMISSION OF NEVADA

In re Petition of VERIZON CALIFORNIA INC., d/b/a)
 VERIZON NEVADA, for arbitration of an amendment)
 to Interconnection Agreements with Competitive Local)
 Exchange Carriers and Commercial Mobile Radio Service)
 Providers pursuant to Section 252 of the Communications)
 Act of 1934, as amended, and the Triennial Review Order.)

Docket No. 04-2030

At a general session of the Public Utilities Commission of Nevada, held at its offices on April 28, 2004.

PRESENT: Chairman Donald L. Soderberg
 Commissioner Adriana Escobar Chanos
 Commissioner Carl B. Linvill
 Commission Secretary Crystal Jackson

ORDER GRANTING MOTIONS TO DISMISS

The Public Utilities Commission ("Commission") makes the following findings of fact and conclusions of law:

I. Procedural History

1. On February 20, 2004, Verizon California Inc., d/b/a Verizon Nevada ("Verizon"), filed a Petition, designated as Docket No. 04-2030, with the Commission for arbitration of an amendment to interconnection agreements with Competitive Local Exchange Carriers ("CLECs") and Commercial Mobile Radio Service ("CMRS") Providers pursuant to Section 252 of the Communications Act of 1934, as amended, and the Federal Communications Commission's ("FCC") October 2, 2003, *Triennial Review Order* ("TRO").

2. Verizon states that it seeks arbitration in order to implement its proposed amendment to the respective interconnection agreements between Verizon and the CLECs and CMRS Providers listed below. Verizon states that the proposed amendment implements the

Docket No. 04-2030

Page 2

changes in Incumbent Local Exchange Carrier network unbundling obligations promulgated in the *TRO*. The CLECs and CMRS Providers with whom Verizon seeks arbitration are: 1-800-RECONEX INC., American Fiber Network Inc., AT&T Wireless Services of Nevada Inc., Brooks Fiber Communications of Nevada Inc., Budget Phone Inc., Camarato Distributing Inc., Cat Communications International Inc., Ernest Communications Inc., Florida Telephone Services, ICG Telecom Group Inc., Intermedia Communications Inc., KMC Telecom V Inc., MCImetro Access Transmission Services LLC, Metropolitan Telecommunications of Nevada Inc., Nevada Wireless LLC, Pac-West Telecomm Inc., Preferred Carrier Services Inc., Southwestco Wireless LP, Sacramento Valley Limited Partnership, Cellco Partnership, Sprint Communications Co. L.P., VarTec Telecom Inc., WPTI Telecom LLC, and Z-Tel Communications Inc.

3. The Commission has jurisdiction over this matter and legal authority to conduct proceedings pursuant to the Nevada Revised Statutes ("NRS") and the Nevada Administrative Code ("NAC"), Chapters 703 and 704, including but not limited to, NRS 704.040 and 704.120 and NAC 703.286 – 703.288, and 47 United States Code ("U.S.C.") § 252(b).

4. The Commission issued a public notice of this matter in accordance with State and Federal law and the Commission's Rules of Practice and Procedure.

5. On February 27, 2004, Verizon filed an Amended Exhibit 1 to the Petition. On March 11, 2004, Verizon filed an Affidavit of Service for the Petition and Amended Exhibit 1.

6. On March 11, 2004, Verizon filed a letter with the Commission indicating that it might file a revised amendment to its interconnection agreements by March 19, 2004, due to the March 2, 2004 decision of the D.C. Circuit Court of Appeals vacating certain portion of the *TRO*.

Therefore, Verizon proposed that the CLECs be allowed to respond to the Petition within 25 days after March 19, 2004.

7. On March 15, 2004, PacWest Telecomm Inc. and ICG Telecom Group filed a Motion to Associate Counsel.

8. On March 16, 2004 the Commission received responses to the Petition from WPTI Telecom LLC; jointly by Brooks Fiber Communications of Nevada, Inc., Intermedia Communications, Inc., and MCImetro Access Transmission Services LLC (collectively "MCI"); and KMC Telecom V Inc. The Commission also received Responses to the Petition and Motions to Dismiss ("Motions to Dismiss") from Z-Tel Communications Inc., the Competitive Carrier Coalition ("Coalition"), and Sprint Communications Company L.P. ("Sprint"). Verizon Wireless filed a letter confirming that it was negotiating with Verizon regarding the terms of a stipulation for dismissal and, upon filing the stipulation, Verizon Wireless could be dismissed from this proceeding.

9. On March 17, 2004, the Attorney General's Bureau of Consumer Protection filed a Notice of Intent to Intervene in this proceeding.

10. On March 19, 2004, Verizon filed an Update to the Petition. Verizon states that the amendment to interconnection agreements that was initially filed with the Commission was prepared before the D.C. Circuit Court of Appeal's decision in *United States Telecom Ass'n v. FCC*, No. 00-1012, 2004 WL 374262 (D.C. Cir. Mar. 2, 2004). In that decision, the D.C. Circuit affirmed in part and vacated in part the *TRO*. Verizon states that the D.C. Circuit struck down several of the unbundling obligations that the FCC imposed on incumbent carriers, while affirming the FCC in almost all respects where the FCC eliminated or restricted the incumbent's

Docket No. 04-2030

Page 4

network unbundling obligations. Thus, the D.C. Circuit's ruling has prompted Verizon to propose conforming modifications of its amendment.

11. On March 22, 2004, Verizon filed an Opposition to Z-Tel's Motion to Dismiss Petition.

12. On March 23, 2003, Verizon filed an Opposition to the Competitive Carrier Coalition's Motion to Dismiss Petition.

13. On March 30, 2004, the Coalition filed a Reply to Verizon's Opposition to the Coalition's Motion to Dismiss Petition.

14. On April 7, 2004, Sprint filed a Petition for Dismissal of Verizon's Request for Arbitration, or, in the Alternative, for an Order to Respond ("Petition for Dismissal"). On April 14, 2004, Verizon filed a response to Sprint's Petition for Dismissal stating that Verizon was not served with a copy of Sprint's Petition for Dismissal until April 13, 2004, and would be filing a response by April 20, 2004. On April 20, 2004, Verizon filed an Opposition to Sprint's Motion to Dismiss and Affidavit of Stephen C. Hughes.

15. On April 13, 2004, MCI and the Coalition filed an updated response to Verizon's Petition for Arbitration.

16. On April 19, 2004, the Coalition filed a letter supplementing its Motion to Dismiss and its Reply to Verizon's Opposition to the Coalition's Motion to Dismiss Petition.

17. On April 26, 2004, Sprint filed a Reply to Verizon's Opposition to Sprint's Motion to Dismiss and Response to Verizon's Request for Arbitration. Also on April 26, MCI filed a response to the Coalition's April 19, 2004 letter.

II. Positions of the Parties

A. **Z-Tel**

18. Z-Tel argues that Verizon's Petition should be dismissed because the Petition does not comply with the notice, change in law, and dispute resolution provisions of their interconnection agreement. Z-Tel states that Verizon's October 2, 2003 industry letter was a notice of termination of certain unbundled network elements ("UNEs"), none of which are ordered by Z-Tel, and a notice that an amendment was available to CLECs seeking to amend their interconnection agreements. However, Z-Tel contends that there has been no negotiations or request for negotiations between Z-Tel and Verizon. Additionally, Z-Tel argues that Verizon's Petition does not satisfy the procedural requirements in 47 U.S.C. § 252 for filing arbitrations because, among other things, Verizon's Petition does not list the unresolved issues between Z-Tel and Verizon, and the position of each of the parties on the unresolved issues. 47 U.S.C. § 252(b)(2)(A).

B. **Sprint**

19. Sprint argues the Petition should be dismissed for three reasons. First, Verizon has failed to comply with its obligations under the Telecommunications Act of 1996 ("the Act") to engage in good faith negotiations, which is a mandatory prerequisite to filing a petition for arbitration. Second, Verizon's Petition is procedurally defective and in violation of both the Act and the rules of the Commission. Sprint states that Verizon failed to submit the information required by 47 U.S.C. § 252(b)(2) which is also required by NAC 703.286(1). In addition, Sprint contends that Verizon violated the rules under the Act and the Commission's rules regarding filing and service of process. 47 U.S.C. § 252(b)(2)(B)(1) requires that Verizon provide a copy of the Petition to the other parties "not later than the day on which the State commission receives

Docket No. 04-2030

Page 6

the petition.” Additionally, NAC 703.286(1)(h) requires that the Petition include “[a] certificate of service demonstrating that the petition has been served upon the other party to the negotiations, the staff of the commission and the consumers’ advocate and that a copy of the petition has been provided to each person and entity on the list for notification established pursuant to NAC 703.286.” Verizon filed the Petition on February 20, 2004 but did not provide Sprint with a copy of the Petition until March 11, 2004, when Sprint’s counsel received a copy of the Petition by electronic mail. Third, Verizon’s Petition violates the change in law provisions of the existing interconnection agreement between Verizon and Sprint.

C. Competitive Carrier Coalition

20. The Coalition also argues that Verizon’s Petition should be dismissed because Verizon did not comply with filing requirements mandated by state and federal law. Additionally, the Coalition states that Verizon failed to serve the Commission’s Section 252 list of parties established under NAC 703.296. Service of the Petition wasn’t made until March 10, which the Coalition didn’t receive until March 15, and at that point the Coalition was prejudiced in their ability to respond because responses to the Petition were due the next day. The Coalition contends that Verizon’s Petition is also premature because there has not been an effective change in law, and consideration of Verizon’s Petition would be a waste of administrative resources. The Coalition contends that as long as the Triennial Review proceeding remains pending before the FCC, neither the FCC’s *UNE Remand* nor the *Line Sharing* proceedings have been terminated by a final, non-appealable order constituting a change of law under the Bell Atlantic/GTE merger conditions. The *TRO* is far from being final and non-appealable. This decision is expected to be appealed to the United States Supreme Court and, if and when the appeals are completed and if the case is remanded to the FCC, the FCC will have to prescribe

new rules. Thus, the Coalition believes it would be a waste of the Commission's resources to consider Verizon's Petition at this time, when the law on which the Petition is based is still undetermined.

D. Verizon

21. In response to the Motions to Dismiss, Verizon states that it did all it was required to do to initiate negotiations with the CLECs, and it was Z-Tel's failure to respond that prevented negotiations from taking place. Verizon also states that it has negotiated in good faith with Sprint, but they have simply not reached an agreement. Verizon contends that its Petition conforms to all applicable formal requirements of 47 U.S.C. § 252, and that it filed the Petition within the window established by the Triennial Review Order. Verizon states that the *TRO* was upheld by the D.C. Circuit in numerous respects, particularly insofar as it reduced prior federal unbundling requirements, and Verizon's proposed amendment contains provisions to address any future legal developments with respect to the *TRO*. Verizon requests that the Motions to Dismiss be denied.

III. Commission Discussion and Findings

22. Since Verizon's initial filing, the status of the *TRO* has been thrown into a state of flux. On March 2, 2004, the D.C. Circuit Court of Appeals vacated and/or remanded various portions of the *TRO*, including those that relate to the FCC's unbundling rules. This decision, in turn, may be appealed to the United States Supreme Court. Once the appeals are completed, if the case is remanded the FCC will have to prescribe new unbundling rules. Recognizing this uncertainty, the FCC filed a consent motion with the D.C. Circuit for an additional 45-day extension of the stay of its decision vacating the FCC's unbundling rules to allow the telecommunications carriers to engage in good faith negotiations to arrive at commercially

Docket No. 04-2030

Page 8

acceptable arrangements for the availability of UNEs. Consent Motion of the FCC and the United States to Extend the Stay of the Mandate, *United States Telecom Ass'n v. FCC*, No. 00-1012, 2004 WL 374262 (D.C. Cir. Mar. 2, 2004). On April 13, 2004, the D.C. Circuit issued an Order extending the stay of its mandate through June 15, 2004. *United States Telecom Ass'n v. FCC*, No. 00-1012 (D.C. Cir. April 13, 2004 Order). Given that the law which is the basis of Verizon's Petition is unsettled and the issues may be resolved through commercial negotiations, it would be a waste of the Commission's resources to undertake the process of amending interconnection agreements at this time.

23. Additionally, Verizon did not comply with the Commission's arbitration rules set forth in NAC 703.280-703.296. The Commission is required to issue an order in this docket on an expedited basis by July 2, 2004. 47 U.S.C. § 252(b)(4). It is essential that the Petition contain the information required by NAC 703.286(1), including identifying the unresolved issues and the positions of the parties on those issues pursuant to 47 U.S.C. § 252(b)(2), in order to narrow the issues that need to be resolved by the Commission in such a short time frame.

24. The Commission finds that it is in the public interest to dismiss Verizon's Petition for Arbitration without prejudice.

THEREFORE, based on the foregoing findings and conclusions, it is hereby ORDERED that:

1. The Motions to Dismiss filed by Z-Tel Communications Inc., the Competitive Carrier Coalition, and Sprint Communications Company L.P. are GRANTED.
2. Verizon's Petition for Arbitration is DISMISSED without prejudice.

Docket No. 04-2030

Page 9

3. The Commission retains jurisdiction for the purpose of correcting any errors that may have occurred in the drafting or issuance of this Order.

By the Commission,

DONALD L. SODERBERG, Chairman

ADRIANA ESCOBAR CHANOS, Commissioner

CARL B. LINVILL, Commissioner

Attest: Crystal Jackson
CRYSTAL JACKSON, Commission Secretary

Date: Carson City, Nevada

5-4-04

(SEAL)



Attachment K

state commissions to be vigilant in monitoring compliance with the provisions of sections 251 and 252.”¹⁵ (Emphasis added.) We believe that the § 252(b)(2) requirements are included in this FCC request. Furthermore, among other things, Verizon Hawaii contends that a dismissal of the Petition due to any technical defects would be a “disproportionate and inappropriate” response. However, we believe that Verizon Hawaii’s failure to comply with these requirements necessitate the commission to deny its Petition; especially since we are only given until July 2, 2004, to complete our review, make our determinations, and issue an order. The form in which Verizon Hawaii filed its Petition makes it impracticable, if not virtually impossible for the commission to meet this deadline.

Second, the D.C. Circuit Court in *USTA II* vacated and remanded certain portions of the *TRO* back to the FCC. In the order, the D.C. Circuit Court temporarily stayed the issue of the mandate until the latter of (1) a denial of any petition for rehearing or rehearing *en banc*; or (2) sixty (60) days from the issuance of the order (on or about May 1, 2004). Soon thereafter, the D.C. Circuit Court granted the FCC’s request for an extension of the stay for forty-five (45) days. Thus, the *USTA II* mandates will not be issued until on or about June 15, 2004, at this time. Clearly, the implications of the *TRO* are not settled. The filing of Verizon Hawaii’s Update and its May 7,

¹⁵See, *TRO* at ¶ 703.

2004 Motion for Abeyance¹⁶ provides further evidence of the current uncertain legal conditions surrounding the TRO. Additionally, there is no assurance that another stay or a rehearing of the issues by any court will not be granted. We believe that it would be inappropriate, untimely, and a waste of the parties' and commission's resources to grant Verizon Hawaii's request for a consolidated arbitrated proceeding, at this time. Verizon Hawaii's contention that its Update was structured to accommodate future legal developments is unpersuasive since the legal environment at this time is too uncertain.

Moreover, there are certain aspects of Verizon Hawaii's Petition that we find questionable. For instance, while Verizon Hawaii insists that the FCC in the TRO requires carriers to employ the § 252(b) timetable, it fails to elaborate that the FCC set this timetable as a "default timetable for modification for interconnection agreements that are silent concerning change of law and/or transition timing."¹⁷ (Emphasis added.) Based on the filings, it appears that "change of law" provisions do exist in the interconnection agreements between Verizon Hawaii and certain Non-petitioning Parties including, but not limited to,

¹⁶In its Motion for Abeyance, Verizon Hawaii requests that we hold this proceeding until June 15, 2004 (the day the *USTA II* mandates are expected to be issued) to conserve the resources of the commission and the parties. Furthermore, it requests that we toll the time for the completion of the arbitration and that it will propose a procedural schedule for the recommencement and completion of the arbitration proceeding on or shortly after June 15, 2004.

¹⁷See, TRO at ¶ 703.

Attachment L

FILE
FAX

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

RECEIVED

OCT 14 2004

DOCKETING DIVISION
Public Utilities Commission of Ohio

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October 14, 2004

BY OVERNIGHT MAIL

Renee J. Jenkins, Director of Administration
Docketing Department
Public Utilities Commission of Ohio
180 E. Broad Street
Columbus, OH 43215-3793

Re: Case No. 04-1450-TP-CSS; Motion to Dismiss and Answer to SBC Ohio's Complaint

Dear Ms. Jenkins:

Please find attached an original and ten (10) copies of the Motion to Dismiss and Answer to SBC Ohio's Complaint in the above-referenced case on behalf of Respondents referenced therein. Per our prior arrangement, this filing was also faxed to the Docketing Department on the afternoon of October 14, 2004 so that it could be deemed filed as of that date.

Please date-stamp the extra copy and return it in the enclosed self-addressed, stamped envelope. Should you have any questions please do not hesitate to contact me at (202) 945-6940.

Respectfully submitted,


Paul B. Hudson

cc: Service List

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Complaint of SBC Ohio,)	
)	
Complainant,)	
)	
v.)	Case No. 04-1450-TP-CSS
)	
ACC Telecommunications LLC, <i>et al.</i>)	
)	
Respondents.)	
)	

MOTION TO DISMISS AND ANSWER TO SBC OHIO'S COMPLAINT

Access One, Inc.; ACN Communications Services, Inc.; Adelpia Business Solutions Operations, Inc.;¹ American Fiber Systems, Inc.; BullsEye Telecom, Inc.; Cinergy Communications Company; Cinergy Telecommunications Networks-Ohio, Inc.; CityNet Ohio, LLC; City Signal Communications, Inc.; CloseCall America, Inc.; CoreComm Newco, Inc.; Digicom, Inc.; DSLnet Communications, LLC; Lightyear Network Solutions, LLC;² Neutral Tandem-Michigan, LLC; and PNG Telecommunications, Inc. ("Respondents") submit the following Motion to Dismiss and Answer to SBC Ohio's ("SBC's") Complaint.

MOTION TO DISMISS

SBC's opening sentence of its Complaint absurdly proclaims that it filed "at the direct suggestion of the Federal Communications Commission."³ On the contrary, the FCC

¹ SBC's Complaint names Adelpia Business Solutions Operations, Inc. as a Respondent; however, that entity has changed its name to TelCove Operations, Inc., and the company has notified SBC of the name change.

² SBC's Complaint names Lightyear Communications Inc. as a Respondent; however, that entity is defunct and its interconnection agreement was assigned to Lightyear Network Solutions, LLC. As a show of its good faith, the assignee has responded to the Complaint on behalf of itself rather than objecting to SBC's error.

³ SBC Complaint at 3 (first sentence of Complaint).

basis of Verizon's Petition is unsettled ... it would be a waste of the Commission's resources to undertake the process of amending interconnection agreements at this time."³⁵

We urge the Commission to follow the example of these other commissions. But if there is any doubt, the best reason for the Commission to dismiss can be found from a review of the state proceedings where Verizon's petitions have not been stayed or dismissed. Those cases, unlike the ones cited above, have now been ongoing for nearly eight months – and have accomplished nothing. Not one of these cases has been able to even reach the stage of briefing or hearings, and it is now apparent that the new FCC rules will likely overtake the proceedings before a decision based on the existing uncertain scheme could be reached. The only products of these cases to date are significant expenses for the parties and significant aggravation for the commissions.

In sum, SBC (1) slow-rolled contract negotiations while it was challenging the *TRO*, (2) after *USTA II*, argued that continuation of the state *TRO* proceedings would be “wasteful” until the “FCC formulates its new unbundling rules;” and (3) now argues that the Commission must hurry to adopt new contract terms immediately despite the fact that new FCC rules are expected soon. SBC's self-serving strategy is comparable to a football team taking the lead late in the third quarter and then immediately attempting to declare the game over, even as the other team was marching down the field poised to score. As demonstrated above, the final whistle cannot be blown prematurely at SBC's request; instead, no contract amendment can be approved without a determination that the amendment would meet the requirements of Section 251. Since

³⁵ Petition of Verizon California, Inc., dba Verizon Nevada, for arbitration of an amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order, Docket No. 04-0230, Order Granting Motions to Dismiss at ¶ 22 (Nevada Pub. Util. Comm., April 28, 2004) (“*Nevada Arbitration Dismissal Order*”).

Attachment M

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Bell Telephone Company,)	
)	
Complainant,)	
)	
v.)	Docket No. 04-0606
)	
1-800-RECONEX, Inc., <i>et al.</i>)	
)	
Respondents.)	
)	

**MOTION TO DISMISS, MOTION IN THE ALTERNATIVE FOR A SUFFICIENT
PLEADING AND FOR A BILL OF PARTICULARS, AND VERIFIED ANSWER TO
ILLINOIS BELL’S AMENDED COMPLAINT**

ACN Communications Services, Inc.; BullsEye Telecom, Inc.; DSLnet Communications, LLC; Globalcom, Inc.; Looking Glass Networks, Inc.; Neutral Tandem-Illinois, LLC; and RCN Telecom Services of Illinois, Inc. (“Respondents”) submit the following Motion to Dismiss, an alternative Motion For a Sufficient Pleading and for a Bill of Particulars, and their Verified Answer to Illinois Bell’s (“SBC’s”) Amended Complaint (“Complaint”) pursuant to 83 Illinois Administrative Code §§ 200.180 and 200.190.

MOTION TO DISMISS

SBC’s Complaint absurdly proclaims that it filed “at the direct suggestion of the Federal Communications Commission.”¹ On the contrary, the FCC conspicuously suggested to the state commissions that consideration of SBC’s proposed contract amendment, while permitted,²

¹ SBC Amended Complaint at 4.

² SBC Amended Complaint at ¶ 19.C (citing *Unbundled Access to Network Elements, Review of the Section 251 Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 04-313 & 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, ¶ 22 (rel. August 20, 2004) (“*Interim Order & NPRM*”).

B. The Commission Could Not Approve SBC’s Proposed Amendment at This Time without Conducting Its Own Impairment Analyses.

Grant of SBC’s request for immediate approval of its amendment – which it claims is “utterly unobjectionable” – would be unlawful because the Act prohibits state approval of non-negotiated interconnection agreement amendments without a finding based on record evidence that the amendment would “meet the requirements of Section 251, *including* the regulations prescribed by the [FCC] pursuant to Section 251.”¹⁸ This standard requires the Commission to undertake an independent analysis of Section 251 above and beyond the FCC regulations. Had Congress intended that states only consider whether an agreement meets the requirements of FCC regulations, it would have said so, but instead asked the states to address the full scope of Section 251 and all other “open issues.”¹⁹ Numerous state commissions, including this one, have previously exercised this obligation by ordering unbundling of elements that had not yet been addressed by the FCC, such as dark fiber or components of SBC’s Project Pronto architecture. Similarly, to consider SBC’s Complaint now, the Commission would first be required to fill the gaps in the FCC regulations needed to assure that the resulting revised agreement satisfied the standards of Section 251. Accordingly, after *USTA II* vacated certain FCC unbundling rules, the Connecticut Department of Utility Control explained:

because the FCC must make a finding of impairment to unbundle certain elements, the fact that there has been no discussion or decision regarding a network element does not equate to a nationwide finding of non-impairment for purposes of § 251(d)(3), just as it does not equate to a nationwide finding of

¹⁸ 47 U.S.C. § 252(c)(1) (emphasis added); *see also* 47 U.S.C. § 252(e)(2)(B) (an arbitrated agreement must meet the requirement of Section 251).

¹⁹ In addition, the Act explicitly permits state commissions to arbitrate all “open issues,” 47 U.S.C. §252(c), which necessarily includes issues that are open because the FCC has not issued regulations that resolve them. Thus, this Commission is not limited to implementation of FCC rules; instead, the FCC’s regulations (if any) are only one of the criteria that must be satisfied in a state commission’s overall analysis of whether an agreement meets the requirements of Section 251.

impairment. Rather, by virtue of § 251(d)(3), the status of any network element is left undecided and left to the states ... to determine the element's status.²⁰

Thus, to approve a contract amendment that would eliminate a UNE offered under an existing contract, the Commission would be required to make its own non-impairment finding with respect to that element to ensure that any amendment would be consistent with Section 251²¹ and with state law and policy. The Commission therefore has three options for addressing SBC's Complaint: (1) follow the lead of numerous other states and defer this proceeding until the FCC has established new rules that implement Section 251 of the Act, (2) move forward with its own impairment analyses to determine which of the UNEs that would be eliminated by SBC's proposed amendment are in fact required by the Act; or (3) determine that SBC remains obligated to provide the UNEs in question pursuant to an independent legal obligation, such as its federal SBC/Ameritech merger conditions, state law or policy, or Section 271.

C. SBC's Own Statements Confirm The Finding Of The FCC And Numerous State Commissions That Consideration Of SBC's Complaint Would Be A Waste Of Resources.

The question is thus presented whether the Commission believes that it would be productive to undertake such an impairment analysis at the present time, even though the FCC is currently considering revisions to its definition of impairment and to its list of federal UNEs. For its answer, the Commission should look to its own precedent in the *TRO* implementation

²⁰ See attached Exhibit 5, *Application of The Southern New England Telephone Company For a Tariff to Introduce Unbundled Network Elements – TRO*, Docket No. 00-05-06RE03, Decision at 10 (Conn. Dep't of Public Utility Control, August 25, 2004) ("*Connecticut DPUC USTA II Decision*").

²¹ SBC's Complaint at ¶ 20 alleges that this Commission cannot "supplant" the FCC's role in identifying network elements. However, *USTA II* in no way limits state authority to interpret Section 251. The Act delegated certain obligations to the FCC and left other rights to states. The court's decision on subdelegation only provides instructions to the FCC on how to do *its* job; the Court did not (and could not) strip the states of the authority that the federal Act granted directly to them, or of their authority under state law. Thus, while it is now clear that the FCC cannot delegate the initial creation of the federal UNE list, which Congress asked the FCC to do, *USTA II* does nothing to limit the authority to create additional UNEs pursuant to Sections 251 and 252 that Congress explicitly left to the states.

regulations promulgated thereunder.”⁴⁰ The UNEs that SBC is attempting to eliminate through its proposed contract amendment therefore remain required by Illinois law.

Sections 251(d)(3), 252(e)(3) and 261 of the Act expressly preserve the authority of states and state commissions to enforce their own requirements with respect to access to, and interconnection with, incumbent local exchange company facilities. *USTA II* specifically held that states had not been preempted from imposing state law requirements for any of the UNEs affected by the TRO.⁴¹ The Connecticut Department of Utility Control recently exercised such authority by relying on its state law authority to require SBC to continue to offer the vacated UNEs at existing rates until the new permanent FCC rules are implemented. The DPUC noted that “by virtue of § 251(d)(3), the status of any network element is left undecided and left to the states if they are authorized under state law to determine the element’s status.”⁴² By granting similar relief, this Commission would preserve market stability and avoid needless litigation during the period until new FCC rules are established.

C. SBC’s Amendment Cannot Be Approved Until Its Section 271 Offerings Are Made Available to CLECs at Commission-Approved Rates.

SBC also has an independent obligation to provide access to network elements pursuant to its ongoing obligations under Section 271. The Commission cannot reasonably approve any SBC contract amendment that takes away a UNE unless and until it has first approved a just and reasonable and generally-available rate at which SBC will make that network available under Section 271.

⁴⁰ *Id.*

⁴¹ *USTA II*, 359 F.3d 554, 594 (D.C. Cir. 2004) (“deferring judicial review of the preemption issues until the FCC actually issues a ruling that a specific state unbundling requirement is preempted”).

⁴² *See* attached Exhibit 5, *Connecticut DPUC USTA II Decision* at 10-11.

The Commission's endorsement of SBC's Section 271 application was premised on the existence of competition that relied in large part on the availability of loops, switching and transport at TELRIC rates. The sustenance of competition should be an important factor in the Commission's consideration of the appropriate rate for SBC's Section 271 offerings. Until SBC has obtained Commission approval of § 271 rates for network elements that it seeks to withdraw as § 251 offerings through its contract amendment, the Commission should stay consideration of SBC's Complaint.

III. CONCLUSION

For the foregoing reasons, the Commission should dismiss SBC's Complaint.

MOTION FOR A SUFFICIENT PLEADING AND FOR A BILL OF PARTICULARS

If the Commission does not dismiss the Amended Complaint, in the alternative, pursuant to 83 Illinois Administrative Code § 200.190(a), Respondents move for a Commission order that directs SBC to amend its complaint to include specific allegations, with respect to each Respondent, regarding its efforts to comply with the applicable change of law procedures of each Respondent's interconnection agreement.

VERIFIED ANSWER

Respondents jointly answer as follows, except where reference is made to a specific Respondent, to the allegations set forth in the respective paragraph numbers of the Amended Complaint:

1. Admit.
2. Deny that they are a "requesting telecommunications carrier" because it is unclear what SBC means by such allegation in the context of its Complaint, but for

Attachment N

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion
to Govern Open Access to Bottleneck Services
and Establish a Framework for Network
Architecture Development of Dominant Carrier
Networks.

Rulemaking 93-04-001
(Filed April 7, 1993)

Investigation on the Commission's Own
Motion Into Open Access and Network
Architecture Development of Dominant Carrier
Networks.

Investigation 93-04-002
(Filed April 7, 1993)

(Line Sharing Phase)

**MOTION TO ENFORCE D.03-01-077
BY REQUIRING INCORPORATION OF D.03-01-077 RATES, TERMS, AND
CONDITIONS INTO CLEC INTERCONNECTION AGREEMENTS,
DENYING SBC'S MOTION TO STAY D.03-01-077, AND DENYING VERIZON AND
TURN'S APPLICATIONS FOR REHEARING OF D.03-01-077**

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December 23, 2003

a. The FCC Held that State Law Authority is Preserved Unless the Exercise of That Authority Would “Substantially Prevent Implementation” of Section 251.

In its *Triennial Review Order* the FCC claimed to identify a narrow set of circumstances under which federal law would act to preempt state laws:

Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 and do not “substantially prevent” the implementation of the federal regulatory regime...

[W]e find that the most reasonable interpretation of Congress’ intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not “substantially prevent” its implementation.²²

In addition, based upon the Eighth Circuit’s *Iowa Utilities Board I* decision the FCC specifically recognized that state law unbundling orders that are inconsistent with the FCC’s unbundling orders are not ipso facto preempted:

That portion of the Eighth Circuit’s opinion reinforces the language of [section 251(d)(3)], i.e., that state interconnection and access regulations must “substantially prevent” the implementation of the federal regime to be precluded and that “merely an inconsistency” between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3).²³

In sum, the FCC’s *Triennial Review Order* confirms that “merely an inconsistency” between state rules providing for competitor access and federal unbundling rules is insufficient to create such a conflict. Rather, the FCC recognized that the state laws would not be subject to preemption unless they “substantially prevent implementation” of section 251. The Commission is not faced with this situation.

²² See *Triennial Review Order*, at ¶¶ 192, 194.

²³ See *Triennial Review Order*, ¶ 192 n. 611 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806).

b. The FCC Did Not Conclude That D. 03-01-077, Or Any Existing State Commission Unbundling Orders, Would “Substantially Prevent Implementation” of the Act or the FCC’s Rules.

In its *Triennial Review Order*, the FCC did not preempt *any existing* state law unbundling requirements, nor did it act to preclude the adoption of *any future* state law unbundling requirements. This is significant because the FCC was well aware that California and Minnesota had exercised their independent state law authority to unbundle the HFPL.²⁴ Likewise, the FCC was aware that Illinois, Wisconsin, Indiana, and Kansas had exercised their independent authority to unbundle hybrid loops.²⁵ The FCC declined to preempt this Commission’s Order, or any of these unbundling orders, stating only that “in *at least some circumstances* existing state requirements will not be consistent with our new framework and may frustrate its implementation.”²⁶ Accordingly, the FCC has specifically acknowledged that in many circumstances state law unbundling of the HFPL and hybrid loops *would be* consistent with the FCC’s framework and would not frustrate its implementation.

Recognizing that its ability to preempt state unbundling orders consistent with the Act was limited (if existent at all), the FCC declined to issue a blanket determination that all state orders unbundling the HFPL were preempted. Rather, the FCC invited parties to seek

²⁴ **California:** COMMISSION Docket No. R.93-04-003/1.93-04-002; Open Access and Network Architecture Development, Permanent Line Sharing Phase, D. 03-01-077 (Jan. 30, 2003); **Minnesota:** MPUC Docket No. P-999/CI-99-678; *In the Matter of a Commission Initiated Investigation into the Practices of Incumbent Local Exchange Companies Regarding Shared Line Access* (Oct. 8, 1999).

²⁵ **Illinois:** ICC Docket No. 00-0393; *Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service* (March 14, 2001); **Wisconsin:** WPSC Docket No. 6720-TI-161; *Investigation into Ameritech Wisconsin’s Unbundled Network Elements* (March 22, 2002); **Indiana:** *IURC Cause Number 40611-S1, Phase II; In the Matter of the Commission Investigation and Generic Proceeding on Ameritech Indiana’s Rate’s for Interconnection, Service, Unbundled Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes* (Feb. 17, 2001); **Kansas:** KCC Docket No. 01-GIMT-032-GIT; *In the Matter of the General Investigation to Determine Conditions, Terms, and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line Sharing* (Jan. 13, 2003).

declaratory rulings from the FCC regarding whether individual state unbundling orders “substantially prevent implementation” of Section 251. The FCC further asserts that it was “unlikely” that it would refrain from preempting a state law or Order that required the “unbundling of network elements for which the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis.”²⁷ Regardless of this promised “unlikelihood” in the FCC’s preemption position, it is important to note that even pursuant to this oddly qualified presentation the FCC expressly refused to conclude that an order unbundling the HFPL would be preempted as a matter of law, thereby signaling to state commissions that the HFPL could be unbundled under particular circumstances without challenge. The unlikelihood of refraining to preempt must be weighed, the FCC admits, against a test of what “substantially” prevents implementation of the Act. The Commission’s line sharing decision does not “substantially” prevent implementation of the Act; indeed, the opposite is the case.

In any event, neither Verizon nor SBC have availed themselves of the opportunity presented in the Triennial Review Order to seek a specific finding of preemption from the FCC. Unless and until they do so, and unless and until the FCC makes a finding that Section 709.7 and D.03-01-077 are specifically preempted by the Act, the CPUC’s order in D.03-01-077 stands. The citizens of California deserve the benefit of the work of this Commission, through enforcement of this order while these legal machinations continue. Unless and until this Commission’s order is specifically preempted, the CPUC’s order remains the law in California, and cannot be ignored by Verizon and SBC.

²⁶ See *Triennial Review Order*, ¶ 195.

²⁷ See *Triennial Review Order*, ¶ 195.